(11)

No. 93-284-CFX
Status: GRANTED

Title: Security Services, Inc., Petitioner
v.
Kmart Corporation

Docketed:
August 23, 1993

Court: United States Court of Appeals for the Third Circuit

Counsel for petitioner: Taylor,Paul O.

Counsel for respondent: Augello,William J., Howard,Charles

Entry	Date	Note	Proceedings and Orders
1	Aug 23 1993	G	Petition for writ of certiorari filed.
2	Sep 17 1993		Brief of respondent K Mart Corporation in opposition filed.
3	Sep 22 1993		DISTRIBUTED. October 8, 1993
4	Oct 5 1993	X	Supplemental brief of respondent filed.
6	Oct 12 1993		REDISTRIBUTED. October 15, 1993
7	Oct 18 1993		Petition GRANTED.
			**********
8	Nov 10 1993		Record filed.
		*	Original record proceedings United States District Court, Eastern District of Pennsylvania.
9	Nov 12 1993		Record filed.
		*	Partial proceedings United States Court of Appeals for the Third Circuit.
10	Dec 2 1993		Brief amicus curiae of Overland Express, Inc. filed.
11	Dec 2 1993		Joint appendix filed.
12	Dec 2 1993		Brief of petitioner Security Services, Inc. filed.
13	Dec 16 1993	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
14	Dec 29 1993		SET FOR ARGUMENT MONDAY, FEBRUARY 28, 1994. (3RD CASE).
18	Jan 4 1994		Brief of respondent K Mart Corporation filed.
15	Jan 5 1994		Brief amici curiae of United States, et al. filed.
17	Jan 5 1994		Brief amicus curiae of National Industrial Transportation League filed.
19	Jan 7 1994		CIRCULATED.
16	Jan 10 1994		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
20	Jan 11 1994		LODGING by respondent. Copy of Household Goods Carriers' Bureau's Mileage Guide No. 12 ICC HGB 100-A.
21	Feb 4 1994	X	Reply brief of petitioner filed.
22	Feb 28 1994		ARGUED.

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93-284
No. _____

In The
Supreme Court of the United States
October Term, 1993

SECURITY SERVICES, INC.,
Petitioner,
v.
K MART CORPORATION,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDICES

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QUESTION PRESENTED FOR REVIEW

In an action by a motor common carrier to collect its tariff charges may the Interstate Commerce Commission declare the carrier's filed distance rate tariff retroactively void solely because the carrier failed to comply with ICC regulations for the determination of distances?

LIST OF PARTIES

Petitioner Security Services, Inc. (hereinafter "Security") is a corporation previously engaged in common carrier transportation of freight in interstate commerce under the name Riss International Services. Respondent K Mart Corporation (hereinafter "K Mart") is a corporation engaged in retail sales.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 62 U.S.L.W. 2011 and reprinted at Appendix B. The order and decision of the United States District Court for the Eastern District of Pennsylvania (Van Artsdalen, J.) granting summary judgment for Respondent, is unreported and is reprinted as Appendix A.

JURISDICTIONAL BASIS

The judgment of the United States Court of Appeals for the Third Circuit was dated, filed and entered on June 18, 1993. This court has jurisdiction under 28 U.S.C. sec. 1254(1). The petition herein was timely filed pursuant to 28 U.S.C. sec. 2101(c).

STATUTES INVOLVED

49 U.S.C. sec. 10761. Transportation prohibited without tariff.

> Except as otherwise provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under Chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff.

49 U.S.C. sec. 10762. General tariff requirements.

* * *

> (e) The Commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section.

STATEMENT OF THE CASE

Security Services, Inc. ("Security") was a motor common carrier operating pursuant to a certificate of public convenience and necessity issued by the Interstate Commerce Commission ("ICC"). Security operated under Title 49 of the United States Code which governs transportation in interstate commerce.

Pursuant to 49 U.S.C. sec. 10762(a) Security published a tariff containing rates, *inter alia*, stated in cents per mile and filed it with the ICC. The filed tariff specified that a distance guide published by Household Goods Carriers Tariff Bureau and filed with the ICC was to be utilized for a determination of distances. Security failed to follow ICC regulations set forth at 49 C.F.R. sec. 1312.4(d) requiring it to provide the publisher of the distance guide with a current power of attorney at the time of the shipments at issue in this case. Security brought a civil action against K Mart Corporation ("Kmart") to collect freight charges based upon this filed tariff.

On September 9, 1992, the United States District Court for the Eastern District of Pennsylvania entered summary judgment in favor of K Mart and against Security On June 18, 1993 the court of appeals affirmed the district court finding that the ICC could, by its regulations, retroactively declare tariffs void due to failure to provide the publisher of the distance guide with a power of attorney.

I. REASONS FOR GRANTING THE WRIT.

A. The Opinion Below Is Inconsistent With This Court's Previous Opinions Interpreting The Tariff Rejection Provisions Of The Interstate Commerce Act.

One of the many requirements of the Interstate Commerce Act is that motor common carriers subject to ICC authority may provide regulated services only pursuant to tariffs filed with the Commission. 49 U.S.C. sec. 10761(a). Common carriers are specifically forbidden to provide such services in the absence of tariffs and "may not charge or receive a different compensation" than the rate specified in the tariff. 49 U.S.C. sec. 10761(a). By requiring filed tariffs and strict compliance with them, the Act seeks to avoid unjust discrimination and to give shippers an advance opportunity to challenge proposed rates. To achieve this protection, the Act provides explicit procedures, remedies and penalties.

Chronologically, the first step in fixing a new rate, or changing an existing one occurs when the motor common carrier files with the Commission a new tariff, which may not take effect until a specific advance notice period has elapsed. 49 U.S.C. sec. 10762(c)(3). A subdivision of the same section that governs tariff filings provides that the Commission may reject such a "submitted" tariff if the tariff "violates this section or a regulation of the Commission carrying out this section." 49 U.S.C. sec. 10762(e). If the Commission accepts the tariff for filing, the next step under the statutory plan allows the Commission to suspend the effectiveness of the new tariff – before it becomes effective – for a period of seven months after the

tariff would otherwise go into effect and to commence an investigation into its lawfulness. 49 U.S.C sec. 10708(b).

The suspension period is limited, however, to a specified time period after which the tariffs go into effect if the Commission has not completed its inquiry. At the end of the investigation, the Commission can also prescribe new rates for the future if the filed tariff is found to be unlawful. 49 U.S.C. sec. 10704.

If the tariff goes into effect, the shipper may, at any time, file a court complaint for overcharges, i.e. payment of charges in excess of the filed tariff pursuant to section 11706(b). Alternatively, the shipper can sue for damages under 49 U.S.C. sec. 11705(b)(3) and 49 U.S.C. sec. 11706(c)(2) if the carrier has collected the published tariff rate but that rate is unlawful under the substantive standards of the Act (e.g., because it is unreasonably high). *Reiter v. Cooper,* 507 U.S. ___, 122 L.Ed.2d 604 (1993)

The opinion below is patently inconsistent with the foregoing statutory plan because it fails to give legal effect to a filed tariff as required by 49 U.S.C. sec. 10761(a). The carrier's filed tariff was never rejected by the Commission upon filing as pursuant to sec. 10762(e). The Commission never suspended Petitioner's tariff pursuant to 49 U.S.C. sec. 10708(b). Respondent has never commenced an ICC proceeding to determine the rate to be applied in the future pursuant to 49 U.S.C. sec. 10704, nor has Respondent commenced a civil action for damages incurred by Petitioner's reference to the distance guide in its filed tariffs, pursuant to 49 U.S.C. secs. 11705(b)(3) and 11706(c)(2).

The opinion below collaterally reviews and gives legal effect to 49 C.F.R. sec. 1312.4(d) which declares a filed tariff "void as a matter of law" where that filed tariff refers to another filed tariff the publisher of which has not been furnished a power of attorney by the carrier. In essence the court below found that Security's *filed* tariff containing *filed* rates stated in cents per mile which *filed* tariff lists another *filed* tariff for computation of distances is retroactively void. This Court has held that the Commission has no general power to retroactively reject a *filed* tariff. *Interstate Commerce Commission v. American Trucking Associations, Inc.*, 467 U.S. 354 (1984). Tariffs may be retroactively voided only where the Act provides a specific statutory mandate to the ICC and the retroactive voiding is closely tied to that mandate. *Id.* at 367.

The court below relied upon the decision by the United States Court of Appeals for the Fifth Circuit in *Freightcor Services, Inc. v. Vitro Packaging, Inc.*, 969 F.2d 1563 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 979 (1993). The "specific" statutory mandate to the ICC which the court in *Vitro* relied upon to retroactively void Petitioner's filed tariff is the National Transportation Policy as codified at 49 U.S.C. sec. 10101. However, the National Transportation Policy provides no specific mandate to the ICC.

In *Interstate Commerce Commission v. American Trucking Associations, Inc.*, 467 U.S. 354, *reh'g. denied*, 468 U.S. 1224 (1984), in an unanimous decision, it was held that 49 U.S.C. sec. 10762(e) (which authorizes the ICC to reject motor carrier tariffs if they violate statutory or regulatory requirements, such, for example, as 49 C.F.R. sec. 1312 concerning publishing and filing tariffs) does not confer upon the ICC the broad power to nullify filed tariffs

retroactively. When faced with the clear holding of this case, it is difficult to imagine how the ICC continues to maintain, as it did in *Jasper Wyman & Son, et al. – Petition for Declaratory Order*, 8 I.C.C. 2d 246 (1990) *reviewed sub nom. Overland Express, Inc. v. Interstate Commerce Commission*, 996 F.2d 356, *petition for rehearing docketed* August 6, 1993 (D.C. Cir. 1993), that the retroactive voiding provision of 49 C.F.R. sec. 1312.4(d) is valid and permits it to ignore filed tariffs. Although this Court in *American, supra*, in a 5-4 vote,[1] decided that the ICC had requisite authority to reject effective tariffs submitted in substantial violation of a rate-bureau agreement, limitation of this authority was confined only to those situations involving "a specific statutory mandate of the Commission . . . [upon which] the exercise [its] of power must be directly and closely tied to. . . . " *Id.*, at 367.

The ICC in *Jasper Wyman* has failed to identify any statutory mandate allowing it to treat as void a tariff which was indisputably on file. Plainly, 49 C.F.R. sec. 1312.4(d) was promulgated pursuant to 49 U.S.C. sec. 10762(b). Yet, 49 U.S.C. sec. 10762(b) is devoid of any provision governing a carrier's failure to comply with the formal manner of publishing tariffs required by that section. Instead, Congress established 49 U.S.C. sec. 10762(e) to govern rejection of tariffs, wherein it is succinctly stated that: "The Commission may reject a tariff submitted to it by a common carrier under this section if that

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[1] In Part A of the opinion, this Court *unanimously* found that the ICC did not have retroactive authority based upon 49 U.S.C. sec. 10762(e) to nullify effective tariffs if they violated the ICC's tariff publishing regulations.

tariff violates this section or regulation of the Commission carrying out this section." Thus, it is evident from the clear reading of the statute Congress intended that *any* regulation concerning the rejection of tariffs promulgated pursuant to 49 U.S.C. Section 10762(b) was to be governed by 49 U.S.C. sec. 10762(e). Moreover, in *American* this court found that rejection power could not be used retroactively:

> [T]he language of subsection 10762(e) and the structure of the Commission's remedial authority under the Interstate Commerce Act (ICA) as amended, 49 U.S.C. Section 10101 et seq. persuade us that Congress could not have meant subsection 10762(e) to confer on the Commission a broad power to nullify effective tariffs retroactively.

Id., at 361-62.

The ICC stated in *Jasper Wyman* that it did not retroactively reject the carrier's tariff as void. 8 I.C.C. 2d 258. Rather, it claims the filed tariffs are not effective. This Court has, however, determined that where as here the Commission had already accepted the tariff as-filed, to interpret the ICC's power to *reject* a tariff as also including a license to *revoke* it, "would be contrary to the plain language of the subsection." *American*, 467 U.S. at 362. Moreover, this Court found that allowing retroactive rejection of filed tariffs under sec. 10762(e) would impermissibly afford the Commission far greater authority than is provided under 49 U.S.C. sec. 10704(b), relating to the Commission's authority to cancel effective tariffs and prescribe new rates for the future based upon a reparations finding.

In *American* it was also noted that since the Commission's power to suspend and investigate rate filings is limited to seven months after the proposed tariff's effective date and final action must be taken only after a full hearing (See 49 U.S.C. sec. 10708), to read 49 U.S.C. sec. 10762(e) as allowing retroactive rejection of effective rates would render the constraints of 49 U.S.C. sec. 10708 "nugatory." 467 U.S. at 363. Here the Commission has not explicitly rejected Security's tariff for failure to provide the publisher of the filed distance guide with a power of attorney before they became effective. Significantly, in order to distinguish *American*, the ICC found in *Jasper Wyman* that the carrier's distance rates were never "effective". However, in *American* it was stated clearly that "effective tariffs" means tariffs that are filed with the agency and have "gone into effect." *Id.*, at 360. The definition of "effective tariffs" is further clarified in footnote 4 of the *American* decision, wherein it is stated:

> Prior to 1979, the Commission had no need to reject *effective tariffs*, because the Commission's staff examined every filing prior to the *effective date* of the proposed tariff and if an obvious defect was discovered the tariff was rejected immediately. . . . Since then, the Commission has reviewed only a random sampling of tariff filings, and tariffs with obvious defects inevitably are *permitted to go into effect*. (Emphasis added).

Id. The Commission itself, prior to the *American* decision, had always held that a tariff which was submitted in a technically defective manner was "not a nullity" and the shipper's recovery was limited to actual damages. *See Boren-Stewart Co. v. Atchison, T. & S.F.R. Co.*, 196 I.C.C. 120

(1933); *Acme Pet Products, Ltd. v. Akron, C. & Y.R. Co.*, 277 I.C.C. 641 (1950). This Court in *American*, at footnote 7, not only cited these two cases with approval, but even adopted the statement from *Acme Pet Products* that "where tariffs are tendered to and accepted by the Commission, the rates therein become applicable, even though technically they should have been rejected upon tender." 467 U.S. at 364.

The Commission definition of an "effective" tariff in *Jasper Wyman* is consistent with the definition adopted by this Court in *American*, and the previous ICC decisions cited therein. In *Jasper Wyman* the Commission stated:

> These tariffs, although not complying with all of the tariff regulations *could be considered on file* because they had met the threshold requirement (i.e., they had been sent to the Commission and had not been rejected at the outset). [Emphasis supplied].

Id. at 259. Here, Security met the same standard: the Security distance rate tariff, including its provision incorporating the filed distance guide by reference, was on file with the Commission and had not been rejected at the outset. Thus it was effective under the Commission's own standard enunciated and ignored in *Jasper Wyman*. It is clear from *American* that the filed tariffs of Security are not to be disregarded or voided merely because of an irregularity in tariff filing requirements.

While it is clear that the ICC has no power pursuant to 49 U.S.C. sec. 10762 to retroactively reject effective rates, neither can Kmart find solace in Part B of the

American opinion allowing for rejection under the Commission's so-called "discretionary powers." These discretionary powers, however, derive from 49 U.S.C. sec. 10321(a) and are limited in application only when necessary to achieve other specific statutory goals. *Id.*, at 367. In *American* the other specific statutory purpose was to insure compliance with rate-bureau agreements (governed by a separate statutory provision that provided exemption from the antitrust laws). Here there is no provision of the Act relevant or even evident other than 49 U.S.C. sec. 10762, which deals with the Commission's general authority to prescribe rules and regulations concerning the filing of tariffs. Pursuant to *American* the Commission has no power or authority to retroactively enforce 49 C.F.R. sec. 1312.4(d), either in conjunction with, or as an adjunct to, 49 U.S.C. sec. 10762(e) through rejecting Security's filed tariff. In *Jasper Wyman* the Commission stated that the tariffs under attack in *American, supra*, could not be treated as void because they were filed (i.e. they had been sent to the Commission and had not been rejected at the outset). So here, Security's tariff had been sent to the Commission and not rejected at the outset. Thus under *American* it cannot be treated as void.

The Court of Appeals found 49 U.S.C. 10762(b) to be the specific statutory mandate authorizing the ICC to retroactively reject a filed tariff. Plainly 49 U.S.C. sec. 10762 cannot be used as a statutory mandate to retrospectively void Security's filed tariff. This is so because Congress established 49 U.S.C. sec. 10762(e) to govern *all* rejections of tariffs established under rules promulgated pursuant to sec. 10762. The language of sec. 10762(e) states:

> The Commission may reject a tariff submitted by a common carrier under *this* section if that carrier violates *this* section or regulation of the Commission carrying out *this* section. [Emphasis supplied].

Thus Congress clearly intended *any* regulation concerning the rejection of tariffs promulgated pursuant to sec. 10762 to be governed by subdivision (e) thereof. Thus, the court below erred by failing to find the specific statutory mandate other than sec. 10762 as required by this Court's decision in *American*.

This Court in *American* specifically found that sec. 10762(e) alone could not be used to retroactively void a filed tariff. Instead sec. 10762(e) is limited to rejections of tariff upon filing. Retroactive rejection of filed tariffs was allowed by this Court only when some other statutory mandate beside sec. 10762 existed. With respect to the second prong of *American*, that the retroactive rejection power be closely tied to the specific statutory mandate, the statute's paramount purpose is to provide open rates, known to all. The net effect of the retroactive rejection condoned by the Court below is to enable the carrier and shipper to enter into secret rate agreements thus instead actually frustrating the Act's paramount purpose. Indeed a motor common carrier and a shipper could secretly scheme to render a tariff void in order to provide a preference to the shipper by failing to provide the publisher of a referred to tariff with the power of attorney required by 49 C.F.R. sec. 1312.4.

It is clear from *American* that the filed tariffs of Security is not to be disregarded or voided merely because of an irregularity in tariff filing requirements. *See also, Davis*

v. Portland Seed Co., 264 U.S. 403 (1924); *Berwind-White Coal Mining Co. v. Chicago and E. R.R.*, 235 U.S. 371 (1914).

In *Davis*, this Court held that the illegality of the filed tariff did not void its application. "The statute requires rigid observation of the tariff without regard to the inherent lawfulness of the rates specified. . . ." *Id.*, 264 U.S. at 404. Likewise, here the Act requires adherence to Security's filed distance rate tariff despite the failure by Security to provide the publisher of the distance book referred to in Security's tariff with a power of attorney.

In *Berwind*, as here, the shipper challenged the carrier's collection of charges based upon the "filed" documents because they did not comply with ICC regulations. The Supreme Court held:

> But the contention [non-compliance with tariff regulations] is without merit. The documents were received and placed on file by the Commission without any objection whatever as to their form and it is certain that, as a matter of fact, they were adequate to give notice.

Id., 235 U.S. at 375.

Similarly, here mileage rates, published in a tariff referring to another tariff as a governing publication for calculation of mileages, were placed on file at the ICC without any objection being made for many years after filing. Certainly, as documents on file with the ICC they are adequate to give notice of the applicable mileages. Even if Security's reference to another tariff is void, at worst the term "miles" becomes ambiguous and the shipper would be entitled to any reasonable determination of mileage.

In Ex Parte No. MC-370, *Tariff Improvement*, 365 I.C.C. 43 (1981), the ICC published a rule (49 C.F.R. Section 1312.7(f)(1)) stating that whenever a carrier files a tariff increasing rates without symbolizing the increase as required by ICC regulations, the tariff is unlawful and, unenforceable. This rule was set aside by this Court in *Aberdeen and Rockfish R.R. Co. v. United States*, 682 F.2d 1092 (5th Cir. 1982), *cert. granted, judgment vacated and remanded for findings in light of Interstate Commerce Commission v. American Trucking Association, Inc.*, 467 U.S. 1237 (1984). Thus, the contention in this case that the carrier's distance rates cannot be used because the ICC tariff publication rules were not fully complied with is flatly refuted by this Court's decisions in *American, Rockfish, Berwind* and *Davis*.

B. THE COURTS OF APPEALS ARE IRRECONCILABLY SPLIT ON WHAT CONSTITUTES AN EFFECTIVE TARIFF.

In *Atlantis Express Inc. v. Associated Wholesale Grocers*, 989 F.2d 281 (8th Cir. 1993) the Court of Appeals held that, although the carrier's tariff was on file with the Commission, it was ineffective due to violations of the Commission's tariff publishing rules.[2] When contrasted against the recent holdings of the District of Columbia Circuit in *Overland Express, supra*, and the Seventh Circuit in *Brizendine v. Cotter & Company*, ___ F.2d ___, 1993 W.L.

[2] The issues raised by this petition are also presented in *F.P. Corp. v. Twin Modal, Inc.*, 989 F.2d 285 (8th Cir. 1993), *petition for cert. docketed* June 24, 1993 (No. 92-2062). The Court in *F.P. Corp.* relied upon its decision in *Atlantis Express, supra*.

292, 348 (7th Cir. 1993), it is clear that the Courts of Appeals are irreconcilably split on the question of whether a filed tariff, not rejected at the outset, is a valid, i.e. effective, tariff.

In *Overland Express*, the District of Columbia Circuit Court of Appeals reviewed and set aside the ICC's decision in *Jasper Wyman, supra*, pursuant to the Hobbs Act. 28 U.S.C. secs. 2321 and 2342. In *Overland Express* the court found that the ICC's power to retroactively void an effective tariff under its discretionary powers did not permit it to void the carrier's tariff merely because the carrier failed to provide a power of attorney to the publisher of the distance guide, stating:

> We rather doubt that [49 U.S.C.] sec. 10762(a)(1)'s permissive authorization for the Commission to require carriers to include other unspecified information is the type of "specific statutory mandate" the court had in mind in *American Trucking*. And the Commission does not seem authorized to reject tariffs retroactively to satisfy a *regulatory* policy not driven by a specific statutory mandate.

In *Brizendine v. Cotter & Company*, ___ F.2d ___, 1993 W.L. 292, 348 (7th Cir. August 5, 1993), the Court found that the ICC lacks the authority under its discretionary powers to retroactively void a filed tariff where the tariff refers to a distance guide in which the carrier did not participate. In *Brizendine* the Court found support for its position in this Court's decision in *American Trucking, supra*, and *Maislin Industries, U.S. Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990):

> *American Trucking* makes clear that a carrier's submitted rate becomes the legal, governing rate when the ICC accepts it. [citation omitted] *Maislin* adds that the filed rate doctrine trumps any contrary regulation promulgated by the ICC. The fact that the ICC interprets 49 C.F.R. sec. 1312(d) as a regulation that helps to *define* whether a rate is filed does not allow the ICC to escape the strictures of *Maislin*.

In noting whether the ICC's retroactive voiding was closely tied to the mandate claimed by the Third Circuit in the opinion below, that is, promotion of non-discriminatory rates, the Court in *Brizendine* stated:

> It is difficult to understand, despite Cotter's claim, how the practice of failing to file a power of attorney would lead to price discrimination. Again, Brown's tariff rate was not secret. Anyone who consulted it could compute the price of shipping. The presence or absence of a separate power of attorney would change nothing. In fact, relieving shippers of the requirement that they must pay rates on file because a formality is missing would do far more to upset the uniformity of pricing than refusing to enforce their tariffs. Like the policy struck down in *Maislin*, the ICC's policy here would "sanction [ ] adherence to unfiled rates, [and thus] undermine [ ] the basic structure of the Act" *Maislin*, 497 U.S. at 132, 110 S.Ct. at 2769, see also *Overland*, slip op. at 10.

Thus the decision in *Overland Express*, which directly reviewed the ICC decision in *Jasper Wyman*, and the decision in *Brizendine* stand in stark contrast to the holdings in *Freightcor Services, Inc. v. Vitro Packaging*, 969 F.2d 1563 (5th Cir. 1992) and the court below wherein the courts

found 49 U.S.C. sec. 10762(a)(1) was a "specific statutory mandate" allowing the ICC to retroactively reject an effective tariff.

In *Genstar Chemical Ltd. v. ICC*, 665 F.2d 1304 (D.C. Cir. 1981), *cert. denied*, 102 S.Ct. 1750 (1983), the continued vitality of *Davis, supra*, and *Berwind, supra*, was acknowledged. In *Genstar*, a shipper argued that the collection of tariff rates should be precluded because of an alleged unlawfulness in the carrier's tariff which, although filed, did not comply with ICC regulations. *Id.*, at 1308. The shipper had asserted its right to the full refund of an illegal rate increase, "not from the establishment of unlawful rates but from the unlawful publication of tariffs." *Id.* The shipper further maintained that unlawfully published tariffs could not serve to increase the transportation rate. The shipper objected to the publication because the carrier's increase exceeded previously approved levels and the updated tariffs did not "plainly state the changes proposed to be made in the schedules then in force as required by 49 U.S.C. sec. 6(3) (now revised as 49 U.S.C. sec. 10762)." *Id.* at 1308. The shipper also objected to the tariffs because they failed to "contain the appropriate symbols (required by agency regulation) or in any other way indicate the nature of the rate change." *Id.* at 1308. After reviewing these claims of tariff non-compliance the Court of Appeals for the D.C. Circuit held:

> The Supreme Court long ago rejected the view that a tariff on file with the Commission and never rejected by it should be disregarded or treated as nonexistent merely because of some element of substantive unlawfulness in the rate.

> [citation to *Davis* omitted], or some irregularity in the tariff filing formalities [citation to *Berwind* omitted]. The principle in these cases is that where the shipper has been charged no more than the rate reflected in the tariff on file, the remedy for unlawfulness or irregularity is measured not by looking to some other tariff but by the harm, if any, caused by the unlawfulness of irregularity.

Id. at 1308.[3]

Five Circuit Courts of Appeals have addressed the issue raised by this petition[4]. Two Circuits, namely the District of Columbia Circuit and the Seventh Circuit, have held that the ICC may not declare a filed tariff void retroactively because that tariff refers to a distance guide tariff in which the carrier did not participate. Two Circuits, namely the Third Circuit and the Fifth Circuit, have held that such tariffs are effective because they are on file, but that the ICC can declare the tariffs retroactively void and allow negotiated, unfiled rates to control in

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[3] Note that the remedy mandated by the ICC in *Jasper Wyman*, a voiding of the tariff, may require re-audit and application of a higher rated tariff, resulting in still higher charges to the shipper, contrary to the remedy indicated by the *Genstar* Court! This would occur, for example, where a distance commodity rate is void and a higher class would become applicable instead.

[4] This question is also pending in other circuits, *see, Growe v. Malden Mills Industries, Inc.*, No. 93-1556 (1st Cir.); *F.P. Corp. v. Golden West Foods, Inc.*, Nos. 92-2000, 92-2045 (4th Cir.); *Freightcor Services, Inc. v. Kuhlman Corp.*, No. 93-5227 (6th Cir.); *Security Services, Inc. v. Ed Sweirkos*, No. 93-3210 (6th Cir.); *Security Services, Inc. v. All Freight Services, Inc.*, No. 92-55785 (9th Cir.); *Pope v. Amoco Fabrics and Fibres Co.*, No. 92-681 (11th Cir.).

order to foster the non-discrimination provisions of the Interstate Commerce Act. Finally one Circuit, namely the Eighth Circuit, as well as the ICC, declare that such filed tariffs need not be declared retroactively void because they never became effective in the first place. This Court should grant certiorari to resolve this clear conflict among the Circuit Courts of Appeals.

CONCLUSION

For the foregoing reasons, the Petition of Security Service should be granted and a Writ of Certiorari issued to the United States Court of Appeals for the Third Circuit.

Dated: August 20, 1993.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

SECURITY SERVICES, INC., f/k/a RISS INTERNATIONAL CORPORATION,	)	Civil Action No. 91-6782
Plaintiff,	)	Philadelphia, PA
vs.	)	September 9, 1992
K MART CORPORATION,	)	1:30 p.m.
Defendant.	)	

TRANSCRIPT OF BENCH OPINION
BEFORE THE HONORABLE
DONALD W. VANARTSDALEN
UNITED STATES DISTRICT JUDGE

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[p. 2] (Call to Order of the Court)

THE COURT: Thank you very much gentlemen. The oral argument has been helpful. This is a motion for summary judgment. I could, of course, take it under advisement, which would mean it would probably be about three months or so and my law clerk would write for me a list of cases and probably make a very nice opinion out of it, but I don't think that this case really requires that. It seems to me that I can give you my decision at this time and give you my basic reasons for the decision that I reach. After all, there's a lot of case law on this – on this particular issue.

This is a motion for summary judgment. The standards for granting summary judgment or denying summary judgment are well-known and are frequently cited. I'm not going to bother to recite them at this time. The

issue in this case, as I see it, is whether a trustee in bankruptcy for a bankrupt interstate motor carrier may recover "undercharges" from a shipper where the carrier and the shipper had a long-term relationship, based on a contract or contracts for hauling various goods of the defendant shipper, K Mart Corporation.

Plaintiff's claim is based on the alleged tariffs which it had filed with the Interstate Commerce Commission, which I will probably refer to as the ICC. Defendant claims that it was a contract carrier, that the rates sought to be recovered are not reasonable, and that the filed – alleged [p. 3] filed tariff is void as to the claimed mileage guide, making determination of the tariff applicable incomplete and unable to – impossible to be calculated.

There is no question that under the controlling law, properly filed tariffs permit a trustee in bankruptcy for a bankrupt interstate motor common carrier to recover the full applicable tariffs, when the carrier billed for lesser amounts which were promptly paid by the shipper. The fairly recent case of *Maisland*, that's M-A-I-S-L-A-N-D, *Industries, U.S., Incorporated vs. Primary Steel, Incorporated*, 110 Supreme Court 2759, 1990, reiterated and reaffirmed this general principle, provided the rates are, in the wording of the act, "reasonable," and the carrier is a common carrier as opposed to a contract carrier.

Defendant asserts, among other defendants, that the rates are not reasonable within the meaning of 49 U.S.C. Section 10701A. Most Circuit Courts of Appeals that have ruled on this issue have held either directly or in dicta that a reasonable defense may be asserted to an undercharge claim. And I would refer to the case of *Atlantis*

Express, Incorporated vs. Standard Transportation Services, Incorporated, 955 F.2d, 529, 535, 536, Eighth Circuit, 1992, and also I refer to defendant's brief on the motion for summary judgment, pages 34 and 35.

The Fourth Circuit Court of Appeals, *In Re: Carolina* [p. 4] *Motor Express, Incorporated,* 949 F.2d 107, 1991, held that the shipper would first have to pay the tariff rate and seek reparations as the basis for – of an unreasonable tariff. The U. S. Supreme Court has granted certiorari and I understand that it's under the name, although I may be mistaken in this citation, of *Cooper vs. Delaware Valley Shippers,* where certiorari was granted on May 18th, 1992 as reported in 1992 West Law, 60686, 60 U.S. Law Week 3675, reported as case number 91-1496.

In any event, both parties to this litigation agree, as I understand it, that to the extent, if any, that a reasonable defense may be asserted, the ICC has primary jurisdiction and would in the first instance have to determine what is a reasonable rate. Consequently, I would not decide this issue, and at most could only refer the issue to the ICC for determination. This is a procedure that has been frequently utilized in similar cases.

Another defense that is raised is that the carrier in this case in its relationship to the shipper, K Mart, was a contract carrier and not a common carrier, and hence the filed tariff rates upon which the plaintiff relies are inapplicable. Again, the parties appear to agree that if the issue of contract carrier or – versus common carrier is critical to the decision, this is a matter in which the ICC has primary jurisdiction and determination would

require referral to the [p. 5] ICC. I refer to the plaintiff's brief page 20 and defendant's brief page 27 to 31.

However, a recent decision of Judge Waldman of this court, *Securities Services, Incorporated, f/k/a Riss International Corporation vs. John Mathey, M-A-T-H-E-Y, Incorporated,* No. 91-6699, Eastern District of Pennsylvania, July 15th, 1992, held that a District Court may properly decide the issue of contract carriage versus common carriage if there is no dispute of facts and it's solely one of law. And that case of Judge Waldman cited other cases in other jurisdictions that seemed to indicate that it is a matter that may be determined by a District Court.

Irrespective of the defenses of the filed tariffs being unreasonable and that the shipments involved were made by a contract carrier, and pursuant to a valid contract of carriage rather than a common carrier, defendant contends that it is entitled to summary judgment on two bases. One, collateral estoppel precludes plaintiff from pursuing this claim because in at least – and I believe it's five decided cases filed by the same plaintiff, in which the same issues were raised, the cases were decided against plaintiff. And I would cite the cases in plaintiff's – defendant's brief on page eight. The basis of these cases was that the tariffs upon which the plaintiff relied, and which are the same tariffs involved in this case, were void and unenforceable.

[p. 6] Plaintiff's response simply contends, and without any support so far as I can ascertain, that the cited cases do not decide the issue of whether the tariff could be invalidated retroactively. All of the cited cases, so far

as I can determine, were claims by the trustee for undercharges based on filed tariffs. The tariffs were held void and unenforceable. As I read the cases, it is clear to me that the issues were exactly the same as in the present case, whether they are denominated as issues of retroactivity expressly or not.

Plaintiff says that the *Cramer Products* case merely refers to the retroactive issue in footnote five. That case is *Security Services, Incorporated vs. Cramer,* that's C-R-A-M-E-R Products, Incorporated, No. 91-966, Western District of Missouri, July 14th, 1992. I do not agree with that statement of plaintiff in plaintiff's brief. Critical to the decision was the holding that the tariff when filed was "ineffective" and therefore action for an undercharge for shipment made after the date of the filing could not be recovered on the action. It is, as I see it, the exact same issue as the present case, it is the exact same issue as presented in the present case, whether or not it is categorized as being a retroactivity – or a retroactive issue.

The basic contention made in defense of all of the [p. 7] cited cases in which recovery was disallowed is the same as in the present case. That is, the filed tariffs of Security Services, Incorporated, which is also known as Riss International, referred to a mileage guide that was included in tariffs filed by the Household Carriers Goods Bureau. That mileage guide was essential to compute the "undercharges." Although a carrier such as Riss may incorporate the tariffs of another carrier or of a tariff bureau in its tariffs, it may only do so if it has filed a power of attorney or a concurrence in accordance with the ICC regulations. This is by expressed ICC regulatory mandate.

It is established by the affidavit of Ann M. Cleland attached to defendant's motion for summary judgment, that at the time Riss filed its tariffs on which it seeks recovery on the undercharges in this case, Riss International Corporation the carrier, was not a party to the mileage guide tariffs filed by the Household Goods Carriers Bureau, and that Riss' participation therein had been canceled sometime prior thereto, I believe on February 19th, 1985. It is – I believe that this fact was in no way disputed by – by the plaintiff in this case, and that the plaintiff agrees that at least as of the time – time periods involved in this litigation, that it was not a participant in the filed tariffs of the Household Goods Carriers Bureau's mileage guide.

Freightcor, that's F-R-E-I-G-H-T-C-O-R, *Services,* [p. 8] *Incorporated vs. Bitro Packaging, Incorporated,* reported in 1992 West Law 142807, No. 91-1507, Fifth Circuit, amended decision of August 14th, 1992, flatly disagrees with plaintiff's position, as I believe plaintiff concedes in its brief on page 10, and I believe plaintiff conceded here in oral argument.

As nearly as I can understand plaintiff's position, it is that whenever a tariff is filed with the ICC, it becomes the controlling tariff unless expressly rejected or suspended by the ICC in accordance with statutory and regulatory provisions. This is true under plaintiff's argument irrespective of the nature of any defect in the filing. Plaintiff asserts that any other holding would be in fact a contradiction to the *Interstate Commerce Commissions vs. American Trucking Association, Incorporated,* 467 U.S. 354, 1984, which precludes the ICC from nullifying retroactively effective tariffs. That case which the parties, and which I

will refer to as *ICC vs. ATA*, involved the validity of ICC inter – of an ICC interpretative ruling that – that where ICC determined there were substantial bureau agreement violations such as unauthorized collusion or illegal bureau pressure on independent carriers, upon a complaint by a shipper or other carriers or interested parties, after a hearing the ICC would "reject" the filed tariff retroactively.

The Supreme Court said the ICC could not ordinarily [p. 9] reject retroactively properly filed tariffs. But under the particular circumstances of that case, it could if there were – it was allowed to and the Supreme Court said retroactive rejection could be done if there were "substantial violation of the Rate Bureau agreements, and if the cases clearly and directly related to the ICC expressed statutory powers and is designed to achieve objectives not for the ICC – the objectives set for the ICC by Congress." That's at – in that case at pages 355, 356.

ICC vs. ATA did not involve any issue as to whether the tariffs when originally filed were valid, lawful or effective. It was assumed that they were. The Supreme Court was merely concerned with whether the ICC could, as a remedial measure, retroactiv[illegible]y reject a filed tariff. Although the Supreme Court did say at page 364 that "We conclude that Section 10762E does not bestow on the Commission a general authority to reject effective tariffs," the Supreme Court did not purport to define what constitutes an effective tariff, beyond noting the statutory and regulatory procedures for initially rejecting proffered tariffs, and noting that because of the lack of ICC personnel to carefully review all tariffs, tariffs may frequently be

filed and become effective that should have been initially rejected.

The ICC in a recent holding directly on point as to the issues in this case held that under 49 CFR Section [p. 10] 1312.4D, it could declare as void tariffs that had been filed in violation of statutory and regulatory requirements. And that case, of course, is *Jasper Wyman*, W-Y-M-A-N, *and Sons, petitioner for declaratory order*, 8 ICC 2.d 246, 1992. *Jasper Wyman* in substance, as I read it, held that where the plaintiff – where the filed tariffs do not comply with expressed regulatory mandate, the tariff never becomes "effective." *Jasper-Wyman* is on appeal to the – to the District of Columbia Circuit as No. 92-1037 under the name I believe of *Overland Express, Incorporated vs. ICC*, 1992.

I believe that there are valid grounds to grant summary judgment for defendant and against plaintiff on the basis of collateral estoppel. The same issue has been repeatedly litigated by plaintiff and decided against plaintiff. See cases cited in defendant's brief. And I think that the plaintiff conceded in oral argument that there are no litigated cases of which he is aware in which his client was successful in recovering an overcharge.

However, rather than grant summary judgment because of collateral estoppel, I've considered the motion for summary judgment on the merits. Essentially for the reasons set forth in *Securities Services, Incorporated f/k/a Riss International Corporation vs. Cramer Products, Incorporated* and *Atlantis Express, Incorporated vs. Associated Wholesale Grocers, Incorporated*, District of Minnesota, Civil Action [p. 11] 4-90-254, decided March 6, 1992, as

well as and I would say primarily upon *Jasper-Wyman*, I conclude that defendant is entitled to summary judgment.

Attached to defendant's brief, there are additional cases and ICC rulings for failure to participate in the HG – the mileage tariff, and they're cited – I believe they are all contained in Exhibit 1 to plaintiff's – to defendant's rebuttal brief. So I won't recite them at this time.

Let me add that if plaintiff's arguments were accepted, it would seem logically to follow that no matter how defective a tariff filing might be, if it was not immediately rejected or suspended in accordance with the statute and regulations, it will become the effective tariff. Thereafter, even if the parties, both the carrier and the shipper, recognize that the attempted filed tariffs were defective and assessed charges on the basis of some previously filed valid tariff, the carrier could later recover undercharges based on the defective tariff.

The so-called Filed Tariff Doctrine was to permit carriers and shippers from entering into private or secret agreements whereby there could be shown favoritism to certain shippers through lower charges, rebates and other advantages against – as against other shippers. The Filed Tariff Doctrine was never intended to allow tariffs that are filed in violation of clear statutory and/or regulatory mandates to [p. 12] become fully effective, simply because as a procedural matter the ICC cannot scrutinize and reject in advance all improper tariff filings.

I am aware of plaintiff's contentions that even if the tariff was defective in the sense of being initially subject to rejection or suspension because the plaintiff carrier

had neither exec – had neither executed a power of attorney, or if he had, that that had been terminated and had not been included in the filing – in the tariffs filed by the – by the Household Goods Carriers Mileage Bureau filing, and that there had been no concurrence to the mileage guide. The defect, if any, was purely a minor technical violation and that mileage is an issue or a matter that can be fairly and accurately determined as a factual matter. And also that the plaintiff did incorporate the mileage guide by reference. In other words, plaintiff claims a substantial compliance with the ICC regulations to the extent that those regulations would be otherwise valid.

49 CFR. Section 1312.4D expressly provides, "A carrier may not participate in a tariff issued in the name of another carrier or an agent unless a power of attorney or concurrence has been executed. Absent effective concurrences or powers of attorney, tariffs are void as a matter of law. Should a challenge to a tariff be made on this basis, carriers will be required to submit the necessary proof." The [p. 13] regulation was undoubtedly made because the ICC lacks sufficient personnel to determine if all referred to tariffs of others was based on a filed power of attorney or concurrence. It put the burden on the carrier to comply with the law.

Plaintiff has submitted no proof that there was a valid power of attorney in effect at the time of the filed – of the filed tariff or the alleged filed tariff. And I believe that the plaintiff concedes that it was not at the time the tariffs were filed a participant in the mileage guide that had been filed by the Household Goods Carriers Bureau.

Although plaintiff argues that the Riss tariff substantially complied with ICC tariff requirements and therefore are fully enforceable, and I refer to plaintiff's brief page 14, this argument it seems to me is akin to an equitable argument that is clearly inapplicable in ICC tariff litigation, except on the possible question of whether a rate is reasonable.

If the ruling announced in this case appears to be harsh and hyper or super technical to plaintiff, it should be borne in mind that the so-called Filed Tariff Doctrine is itself a rigid doctrine, as stated in *Maisland Industries* at page 2766. And in the words of the Supreme Court in *Maisland Industries* at 2767, in which the Supreme Court said that, "Despite the harsh effects of the Filed Rate Doctrine, we have [p. 14] consistently adhered to it." So it is clear that the Filed Rate Doctrine itself is a harsh doctrine and is a rigid doctrine, and therefore technicalities, it seemed to me, are not inappropriate to be utilized, especially in a case such as this where the ship – the carrier had full knowledge and notice and was well aware of the regulations of the ICC, and has offered no reasonable explanation whatsoever as to why it had not filed – or that there was not a proper participation in the filed tariff of – of the Household Goods Carriers Bureau filing as to the mileage guide.

In essence, in this case there was no filed tariff for the ICC upon which a computation of the undercharge could be made. To compute a charge requires an amount per mile and then mileage. Although plaintiff's filed tariffs referred to the mileage guide of the Household Goods Carriers Bureau filing, they did not and could not under the law become a participant of the plaintiff's filed tariffs

because apparently they had not paid the charges and the Bureau had not included them in the list of participants to that particular guide. ICC regulations expressly make such a filing, as done by the carrier in this case, void. The reference without participation in the mileage guide is ineffective, and therefore there was no effective filed tariff as to the mileage charges.

I would say also as an aside, plaintiff has [p. 15] challenged on several grounds the affidavit of Michael Bange, or B-A-N-G-E, a reputed expert witness for defendant. Being – plaintiff being unable to establish by any admissible evidence that it has properly participated in the Household Good Carriers tariffs mileage guide, although it contends that it had executed a power of attorney which had been canceled, and it being apparent and I think conceded by plaintiff that the mileage guide or some factually determinable substitute for it is necessary to compute any undercharges, the use of the Michael Bange affidavit, it seems to me, is wholly unnecessary and at least I have not relied upon it in reaching this decision.

I do not agree with plaintiff's position that *ICC vs. ATA* flatly refutes, as plaintiff says in his brief at page 17, the contentions of the defendants and the holding of *Jasper-Wyman*. Specifically, *ICC vs. ATA* held that under certain carefully circumscribed situations, a tariff could be rejected by the ICC after it was filed. Likewise, I did not agree that the Supreme Court's vacating of *Aberdeen and Rockfish Railroad Company vs. U.S.*, 682 F.2d 1092, Fifth Circuit 1982, suggests that improperly field tariffs can never be ruled to be ineffective. *Rockfish* was vacated and

remanded for reconsideration under the standard set forth in *ICC vs. ATA*. It was not reversed.

Davis vs. Portland Seed Company, 264 U.S. 403, 1924, [p. 16] is of little use because it involved an attempt by a shipper to obtain reparations for an alleged overcharge. That's somewhat the converse of the present case. The court denied recovery absent proof of actual damages. There the shipper was seeking to recover on the basis of an unauthorized publication of a lower long haul rate, unauthorized because not approved by the ICC. The shipper was charged the published short haul rate. The shipper was not allowed recovery.

The court did state that the statute requires rigid observance of its provisions, at page 425, and required adherence to the published rate. The court also opined on page 425, "Observance of the lower rate from Pacos (phonetic) put in without authorization might have been forbidden as pointed out in *U.S. vs. Louisville and Nashville Railroad Company*. This suggests to me at least that although published, a tariff violative of the law may be unenforceable.

Berwin White Company vs. Chicago and Erie Railroad, 235 U.S. 371, decided back in 1914, as I read it, simply held that the contentions that the demurrage traffics were not properly filed "is without merit," page 375. The court also said, "The fact is that the railroad had complied with the law as to filing tariff sheets." There is no suggestion that the court determined that there was any unlawfulness, lack of formality, or illegality in the filing, and therefore the [p. 17] demurrage charges were upheld. This has nothing to do, as I see it, with the question of

whether there was any type of rejection or that there was some improper filing that was somehow otherwise overlooked.

I agree in substance with the ruling of – of the Interstate Commerce Commission in *Jasper-Wyman*. Even if I had some doubts about that ruling, it seems to me that the ICC's interpretation of its own regulations and their applicability, particularly 49 CFR, Section 1312.4D, and whether a mileage guide is a tariff required to be filed, should be given deference by the courts, if the interpretation is a reasonable one. I think that the ICC interpretation and ruling, which the ICC acknowledged was of major importance to carriers and shippers throughout the motor transport industry, should be accepted.

Consequently, I conclude that defendant is entitled to summary judgment under the – on the undercharges – under the undercharge claims of defendant in this action, and I will enter summary judgment. And I'll just read that order. That upon consideration of defendant's motion for summary judgment and plaintiff's answers thereto, together with accompanying briefs, and after a hearing in open court on the motion, for the reasons stated in open court at the conclusion of the hearing, it is ordered that judgment is entered in favor of the defendant, K Mart, and against the plaintiff, Security [p. 18] Services, Incorporated, f/k/a Riss International Corporation, on all of plaintiff's claims being for tariff undercharges set forth in the complaint. I'll sign that order.

All right. Thank you very much, gentlemen.

COUNSEL: Thank you, Your Honor.

(Proceedings concluded)

* * *

CERTIFICATION

I, Roxanne Galanti, certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

/s/ Roxanne Galanti — Oct. 20, 1992
ROXANNE GALANTI — DATE

APPENDIX B

Filed June 18, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1833

SECURITY SERVICES, INC.
f/k/a RISS INTERNATIONAL CORPORATION,
Appellant

v.

K MART CORPORATION,
Appellee

Appeal from the United States District Court
for the Eastern District of Pennsylvania

D.C. No. 0313-2 : 91-06782

Submitted Under Third Circuit Rule
12(6) May 4, 1993
Before: COWEN, ROTH and ROSENN,
Circuit Judges

Opinion Field June 18, 1993

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OPINION OF THE COURT

ROSENN. *Circuit Judge.*

This case presents a recurring question of late whether a carrier in bankruptcy can recover undercharges under tariff rates filed for interstate commerce transportation notwithstanding the lower rates actually negotiated and collected prior to its bankruptcy. Plaintiff-Appellant Security Services, Inc., f/k/a Riss International Corporation (Riss), filed suit in the United States District Court for the Eastern District of Pennsylvania to recover undercharges from the Defendant-Appellee K Mart Corporation for interstate transportation services performed

by Riss on behalf of K Mart. K Mart defended this action by asserting a number of defenses, only one of which is pertinent here: that the tariff relied upon by Riss to calculate the undercharges was void as a matter of law at the time the services in question were performed.[1] If this defense is valid, the tariff cannot serve as a basis from which to calculate such undercharges.

The district court granted K Mart's motion for summary judgment, and Riss appeals. We affirm.

I.

On April 17, 1986, Riss and K Mart entered into a contract under which Riss agreed to transport goods on behalf of K Mart and K Mart agreed to pay for Riss's services at the rates specified in the contract. Between November 3, 1986, and December 29, 1989, Riss performed services for K Mart under the contract and submitted invoices for those services to K Mart in accordance

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[1] Before the district court, K Mart also asserted the following defenses: 1) that in its relationship with K Mart, Riss was a contact carrier; 2) that the charges Riss sought to recover were based on unreasonable rates; and 3) that Riss was collaterally estopped from pursuing its claim because five cases involving the same issues had already been decided against Riss. The district court determined that the ICC had primary jurisdiction over the first two issues and therefore did not decide them. Although it found that collateral estoppel would apply, it declined to rule on that basis, preferring instead to proceed to the merits of the defense now at issue on appeal.

with the terms of the contract.[2] K Mart paid these invoices.

In November 1989, Riss filed a chapter 11 bankruptcy petition. At this point, Riss underwent a corporate reorganization and became known as Security Services, Inc. As debtor-in-possession, it conducted a post-petition audit which seemingly revealed that under the filed rate doctrine, it had undercharged K Mart by a significant amount for the services in question.[3] Riss calculated the amount of the undercharges by comparing the amounts it

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[2] Title 49 U.S.C.A. section 11706(a) (West 1993) provides in pertinent part:

> A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission . . . must begin a civil action to recover charges for transportation or service provided by the carrier . . . within 3 years after the claim accrues.

See Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 123 & n.5 (1990) (applying three year limitations period to debtor carrier's post-petition claim for undercharges after originally billing at lower negotiated rate). Riss filed its complaint in the district court on October 30, 1991. We note that Riss's claim for undercharges on shipments made between November 3, 1986, and October 29, 1988, would appear to be barred by section 11706(a). K Mart, however, failed to assert this affirmative defense and therefore has waived it. Fed. R. Civ. P. 8(c); *Van Sant v. American Express, Inc.*, 169 F.2d 355, 372 & nn. 9, 10 (3d Cir. 1948). 5A Charles A. Wright & Arthur R. Miller. *Federal Practice and Procedure* § 1394 (2d ed. 1990).

[3] The filed rate doctrine, contained in the Interstate Commerce Act, 49 U.S.C.A. § 10101 *et seq.* (West 1993), mandates that common carriers file tariffs from which shippers can calculate their rates and limit those rates be charged by the carrier and paid by the shipper without exception, 49 U.S.C.A. § 10761-62.

had originally invoiced for these services under the contract with amounts that would have been invoiced according to the tariff Riss had on file with the Interstate Commerce Commission (ICC or Commission) at the time the services were performed. Riss thereupon invoiced K Mart for those undercharges plus interest; K Mart, however, refused to pay.

It is undisputed that on August 20, 1984, Riss issued distance rate tariff ICC RISS 501-B with the customary effective date 30 days later. This tariff remained on file with the ICC during the approximately four year period Riss performed the services in question for K Mart under the contract. The tariff in turn referred to and depended upon the Household Goods Carriers' Bureau (HGB) distance guide ICC HGB 100-A, its supplements, and subsequent issues, which specified (1) the distance in miles between various points of origin and destination, and (2) the carriers who were participants in the HGB distance guide.

Riss has produced no direct evidence showing it ever executed a power of attorney or concurrence permitting it to participate in HGB's distance guide. K Mart submitted evidence that HGB cancelled Riss's participation in the HGB distance guide on February 19, 1985, by Supplement 17 to the guide, for Riss's nonpayment of participation fees to HGB. K Mart also submitted evidence that HGB considers a power of attorney "dead" if a carrier fails to renew it (by submitting the participation fees) within a reasonable time after cancellation. There is no evidence, apart from HGB's cancellation of Riss's participation, that Riss, as principal, ever revoked any power of attorney

that may once have existed, or that HGB, as agent, ever renounced any such power of attorney.

II.

A. APPLICABLE LAW

Our review of a district court's grant of summary judgment is plenary. *Carlson v. Arnot-Ogden Memorial Hosp.*, 918 F.2d 411, 413 (3d Cir. 1990). We affirm only if there are no genuine issues of material fact and the relevant law entitles the moving party to judgment. *Carter v. Rafferty*, 826 F.2d 1299, 1304 (3d Cir. 1987); Fed. R. Civ. P. 56(c).

The Supreme Court provided the classic formulation of the Act's filed rate doctrine when it stated in pertinent part:

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers . . . are charged with notice of it, and they as well as the carrier must abide by it. . . . Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed.

Louisville & Nashville R. Co. v. Maxwell, 237 U.S. 94, 97 (1915). No contract between a carrier and shipper can reduce the amount payable under filed and published tariffs specifying the rates adopted by the carrier. *Louisville & Nashville R. Co. v. Central Iron & Coal Co.*, 265 U.S. 59, 65 (1924); *Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156, 163 (1922). "The duty to file rates with the Commission, see [49 U.S.C.] § 10762, and the obligation to

charge only those rates, see [*id.*at] § 10761, have always been considered essential to preventing price discrimination and stabilizing rates." *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 126 (1990). The Court has acknowledged that the rule is strict and may at times work a hardship, but this rigid approach has been deemed necessary to promote the congressional policy of preventing unjust discrimination in interstate commerce. *Id.* at 127-28.

Under ICC regulation, a distance rate tariff consists of two parts: (1) the dollar rate that a carrier charges per mile, and (2) the distance in miles between various points of origin and destination, 49 C.F.R. § 1312.30 (1992); *Jasper Wyman & Son*, 8 I.C.C. 2d 246 (1992). No. 40510, 1992 WL 17399, at *1 (I.C.C. Jan. 29, 1992), *petition for review docketed sub nom, Overland Express, Inc. v. I.C.C.*, No. 92-1037 (D.C. Cir. Feb. 13, 1992). Because the number of miles between two points will vary depending on the route chosen, specification of that number precludes a carrier from favoring one shipper over another by calculating a lower charge for the favored shipper based on a shorter route. This promotes Congress's policy of preventing price discrimination. When a common carrier elects to file a distance rate tariff, as did Riss, it must provide both components to allow a shipper to calculate transportation costs for a given shipment. If a tariff is incomplete because one or the other of these components is missing, the shipper cannot put the tariff to its intended use.

Tariff ICC RISS 501-B specified only the first required component, i.e., the dollar rate Riss would charge per mile. As permitted by ICC regulation, however, Riss's

tariff referred to the HGB distance guide (and its supplements and subsequent issues) to provide the second component. 49 C.F.R. § 1312.30(c)(1)(iii), (c)(4). HGB's distance guide, officially on file with the ICC according to the mandate in 49 C.F.R. section 1312.30(c)(4), is deemed a tariff in its own right. *Jasper Wyman*, 1992 WL 17399, at *3; *Freightcor Servs., Inc. v. Vitro Packaging, Inc.*, 969 F.2d 1563, 1566 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 979 (1993). "Carriers participating in tariffs which refer to, and are governed by separate tariffs. . . . shall also participate in those governing separate tariffs." 49 C.F.R. § 1312.27(e).

To participate as required in a governing separate tariff issued in the name of an agent, as Riss purports to have done in HGB's distance tariff, a carrier must execute a concurrence or power of attorney; *Id.* at § 1312.4(d). Once properly executed, this concurrence or power of attorney must remain effective, because absent an effective concurrence or power of attorney, "tariffs are void as a matter of law." *Id.* Further, if a tariff is challenged on the basis of an allegedly ineffective concurrence or power of attorney, the carrier is responsible for submitting the necessary proof to the contrary. *Id.; cf. id.* at § 1312.10(a). "Revocation . . . of the power of attorney [or] . . . concurrence should be reflected through lawfully published tariff revisions. . . . " *Id.* at § 1312.10(a), (b)(2).

Agents filing governing separate tariffs, such as HGB, are required to provide a list of participating carriers, either within the tariff itself or in a separate participating carriers tariff. *Id.* at §§ 1312.13(c)(1), 1312.25(a). When it is necessary to amend this list due to e.g., the cancellation of a carrier's participation, such amendment

is accomplished by issuing a supplement to the tariff in which the list appears, as HGB did in this case. *Id.* at §§ 1312.17(a-b), 1312.18, 1312.25(d); *see also id.* at § 1312.10(a), (b)(2).

B. THE DISTRICT COURT'S DISPOSITION OF THE CASE

The district court based its grant of summary judgment on the ICC's ruling in *Jasper Wyman*, which is directly on point. In *Jasper Wyman*, as in the present case, the carrier sued the shipper for undercharges based on its distance rate tariff on file with the ICC, which referred to an HGB distance guide as a governing separate tariff.

As in the instant case, the carrier in *Jasper Wyman* contended, without producing any evidence, that at some point it had executed a power of attorney which remained effective to permit participation in the HGB's governing separate tariff at all times pertinent to the claim for undercharges. The shipper, however, presented evidence 1) that the carrier participated in HGB's governing separate tariff from 1970 to May 22, 1983, only, on which date HGB cancelled the carrier's participation for nonpayment of fees in a supplement to its tariff; and 2) that HGB considers a carrier's power of attorney "dead" if the carrier fails to renew it by submitting participation fees within a reasonable time after cancellation. The undercharges sought by the carrier related to transportation services performed after the cancellation date of May 22, 1983.

In *Jasper Wyman*, the ICC first determined that at the time in question there was no effective power of attorney

to permit the carrier's participation in HGB's tariff. Further, the ICC found that, even if an effective power of attorney existed, the carrier was not a participant in HGB's tariff at the time in question because the carrier was not listed by HGB as a participant in the tariff at that time. The ICC finally concluded that either of these determinations of nonparticipation sufficiently precluded the carrier from relying on HGB's tariff for the computation of its freight charges. It therefore held that the carrier's incomplete and ineffective tariff could not lawfully support the claim for undercharges.

In the present case, the district court, on facts identical in all essential respects to those of *Jasper Wyman*, found that Riss had submitted no proof of the existence of an effective concurrence or power of attorney for the period in question. Further, the court found that HGB did not list Riss as a participant in its distance tariff for this period. Because Riss failed both tests under *Jasper Wyman* for an effective participation in HGB's governing separate tariff, the court concluded Riss could not tie into the HGB tariff to complete its own tariff. Consequently, it held that shippers could not compute Riss's charges under the incomplete and therefore ineffective tariff. Thus, Riss had no valid tariff to serve as a basis for calculating undercharges on its shipments for K Mart.

III.

Riss first contends that the district court erred because its tariff complied with ICC regulations in that Riss never revoked its power of attorney originally issued to HGB. Riss further contends that even if its tariff did

not comply with ICC regulations, applicable Supreme Court precedent prohibits the ICC from retroactively rejecting an effective tariff. Riss also asserts that the Riss tariff was in substantial compliance with governing ICC regulations. Finally, if the tariff is deemed void, Riss argues it is nonetheless entitled to receive reasonable compensation for its services, which may be more than the contract rate.

A. COMPLIANCE WITH THE REQUIREMENT OF AN EFFECTIVE POWER OF ATTORNEY

Riss submitted no evidence of the existence of a power of attorney effective during the time pertinent to this litigation. Nevertheless, Riss artfully contends that K Mart's evidence of HGB's 1985 cancellation of its participation in the HGB distance guide raises inferences (1) that it had been a participant in HGB's governing separate tariff prior to the cancellation date; (2) that at one time it had executed a power of attorney to HGB to support its participation; and (3) that such power remained effective at all times pertinent to this litigation. Thus, it argues that its tariff cannot be declared void pursuant to section 1312.4(d).

Section 1312.4(d) provides in pertinent part:

> [A] carrier may not participate in a tariff in the name of . . . an agent unless a power of attorney or concurrence has been executed. Absent effective concurrences or powers of attorney, tariffs are void as a matter of law. Should a challenge to a tariff be made on this basis, carriers will be required to submit the necessary proof.

49 C.F.R. § 1312.4(d). The regulation is precise and specific: It plainly mandates that, upon challenge, the *carrier* submit the proof necessary to establish the existence of an effective power of attorney. The carrier proof provision plausibly places the burden of production upon the carrier, as the party most likely to control relevant evidence, to produce that evidence or suffer the consequences. Here, however, the record does not show that Riss has made any effort to carry its burden. Under such circumstances, a further inquiry into whether an effective power of attorney existed during the relevant period of time is unnecessary.

Further, even if this court should proceed to the merits, the evidence of record does not create a genuine issue of material fact precluding summary judgment for K Mart. An examination of the inferences Riss relies upon shows that the inference critical to Riss's assertion of compliance with section 1312.4(d) is *not* properly raised from the evidence. K Mart's evidence that HGB canceled Riss's participation on February 19, 1985, may raise an inference that at some time prior to that date Riss executed a power of attorney allowing it to participate in HGB's tariff; additionally, it may raise an inference that such a power of attorney remained effective until the cancellation date. Based on general principles of agency law, however, it does not raise an inference that there was an effective power of attorney in existence after HGB canceled Riss's participation. In fact, any inference to be drawn is to the contrary and therefore fatal to Riss's position.

General agency law holds that "[a]uthority created in any manner terminates when either party in any manner

manifests to the other dissent to its continuance, or unless otherwise agreed, when the other has notice of dissent." Restatement (Second) of Agency § 119 (1958). "Such termination by act of the principal is revocation; by act of the agent. It is renunciation." *Id.* at § 118 Cmt. a. A principal, such as Riss, "may manifest [a] termination of consent by conduct which is inconsistent with its continuance: an agent such as HGB, "may manifest renunciation by conduct inconsistent with the continued performance of [its] duties to the principal." *Id.* at § 119 cmt b.

In the present case, HGB's duties to Riss, under any power of attorney that may have once existed were to publish and file a distance tariff on Riss's behalf. *See* 49 C.F.R. § 1312.10(a). To obtain these services. Riss presumably agreed to pay HGB the required participation fees. Accepting as true the inference that Riss had issued a power of attorney, as we must on summary judgment. Riss nonetheless manifested a revocation of that power of attorney when it failed to make the required payment of participation fees because its failure to pay constituted conduct inconsistent with the continuance of its consent. We conclude that this manifestation of revocation rendered ineffective any power of attorney Riss may have issued.

Further, HGB had the power to renounce the authority vested in it by any power of attorney Riss may have issued. It could manifest such a renunciation by conduct inconsistent with the continued performance of the duties it owed Riss. Such a renunciation would render the power of attorney ineffective. HGB's cancellation of Riss's participation in its tariff unquestionably is conduct inconsistent with the continued performance of HGB's

duties to Riss. Thus, we also conclude that, even absent a revocation by Riss. HGB's cancellation operated as a renunciation of authority rendering ineffective any power of attorney Riss may have once executed.

The conclusion that any power of attorney Riss may have issued did not survive its failure to pay or HGB's cancellation of its participation is further supported by evidence that HGB generally considers a power of attorney "dead" at the time of cancellation for nonpayment of fees if the carrier does not renew the power of attorney by submitting the necessary fees within a reasonable time after cancellation. There is no evidence that Riss ever submitted fees to HGB at any time after cancellation, much less within a reasonable time, to "renew" its pre-cancellation power of attorney. Additionally, there is no evidence that Riss issued a new power of attorney to HGB after the cancellation.

Riss also contends that its power of attorney should not be deemed ineffective because HGB did not give it advance actual notice of cancellation. Riss relies on a 1939 ICC notice discussing cancellation of participation for this advance notice requirement. The filed rate doctrine however, charges carriers and shippers alike with constructive knowledge of filed tariffs. HGB's cancellation, filed in a supplement to its tariff, afforded Riss sufficient notice of both the cancellation and HGB's renunciation of any power of attorney that may once have existed. *See Jasper Wyman & Son*, 8 I.C.C. 2d 246 (1992). No. 40510, 1992 WL17399, at *5 (I.C.C. Jan 29, 1992), *petition for review docketed sub nom. Overland Express, Inc. v. I.C.C.*, No. 92-1037 (D.C. Cir. Feb. 13, 1992). A holding to the contrary would vitiate the filed rate doctrine.

Thus, even if this matter is considered on the merits based on the record before this court, the undisputed facts establish that any power of attorney that may have existed became ineffective either when Riss failed to submit its participation fees or, at the latest, once HGB canceled Riss's participation in its distance tariff. Therefore, whether this court applies the carrier proof provision of section 1312.4(d) or decides on the merits under that same section, Riss has failed to "designate specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Under the relevant law, Riss's tariff was void when K Mart made its shipments in 1986 through 1989 because any power of attorney it previously may have issued became ineffective in 1985, 49 C.F.R. § 1312.4(d), and a void tariff cannot support the undercharges Riss seeks. *Jasper Wyman*, 1992 WL 17399, at *1; *Freightcor Servs., Inc. v. Vitro Packaging, Inc.*, 969 F.2d 1563, 1572 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 979 (1993). Therefore absent a reason for not applying section 1312.4(d) as written, K Mart is entitled to judgment as a matter of law.

B. RETROACTIVE VOIDING OF AN EFFECTIVE TARIFF

1. The Validity of the Voiding Provision in Section 1312.4(d)

Riss, however, challenges the authority of the ICC to promulgate and apply the remedial voiding provision of section 1312.4(d) without specific statutory authority. The parties do not dispute that there is no express statutory

authority for section 1312.4(d). Riss argues that this voiding provision must be subjected to the test governing the ICC's discretionary authority to reject retroactively effective tariffs as set forth by the Supreme Court in *ICC v. American Trucking Association, Inc.*, 467 U.S. 354 (1984). In *American Trucking*, the Court determined that, in the absence of specific statutory authority, the remedy of retroactive rejection had to satisfy two criteria to lie within the ICC's discretionary power: "[F]irst, the power must further a specific statutory purpose, and second the exercise of power must be directly and closely tied to that mandate." *Id.* at 367. Riss contends that the voiding provision does not satisfy these criteria.

K Mart urges that a voiding of Riss's tariff under section 1312.4(d) is not a discretionary retroactive rejection of an *effective* tariff that must satisfy standards set forth in *American Trucking* because Riss's tariff was *ineffective ab initio*; alternatively, K Mart argues that if the voiding provision must satisfy the *American Trucking* test. It passes that test and can be applied to void Riss's tariff. For purposes of this discussion and following settled summary judgment law, we take as true the inferences that an effective power of attorney existed from the time Riss issued ICC RISS 501-B in 1984 through HGB's cancellation of its participation in 1985. Consequently, we accept, contrary to the distinction K Mart attempts to demonstrate between this case and *American Trucking*, that Riss's tariff was effective when filed.[4]

---

[4] K Mart interprets *American Trucking* to apply only to effective tariffs, meaning tariffs in compliance with the ICC's tariff regulations. We note without deciding, however (as did the district court, Bench Op. Tr. at 9), that the Court in *American Trucking* arguably used the term "effective" to refer to nothing more than a tariff – whether defective or not – that had passed its effective date without suffering a statutorily permissible pre effective date rejection by the ICC. *See, e.g., American Trucking*, 467 U.S. at 360 n. 4 ("tariffs with obvious defects inevitably are permitted to go into effect"). If this is the case, then the *American Trucking* test would also apply to determine the validity of the voiding provision of section 1312.4(d) even when, unlike the present case, there was no effective concurrence or power or attorney in existence at the time a tariff referring to a governing separate tariff was initially filed.

This alone does not determine the applicability of the *American Trucking* test. *American Trucking* decided whether the ICC had discretionary remedial enforcement authority to retroactively reject an effective tariff, rendering it void *ab initio*. *Id.* at 358, 368 & n.9, 370. Here, the remedy the ICC adopted under section 1312.4(d) is not the exercise of the power of rejection; rather, it is a remedial power to declare a tariff void from the moment a carrier does not effectively concur or maintain a power of attorney to support its participation in a governing separate tariff. The remedial power in this case is in some respects broader than the remedy examined in *American Trucking*. It not only would apply to void a tariff *ab initio* because an effective concurrence or power of attorney did not exist when the tariff was filed; it also allows the voiding of a tariff that was originally accompanied by the required concurrence or power of attorney at some later date if the concurrence or power of attorney becomes ineffective.

Under either scenario, section 1312.4(d) would operate as did the remedy examined in *American Trucking*, to

declare a tariff retroactively void. This voiding power, like the remedy in *American Trucking*, could leave a carrier exposed to overcharges, regarding which the Court stated, "[T]he very potency of overcharge is what makes the nullification of motor-carrier tariff's a troubling exercise of Commission authority. For a motor carrier, overcharge liability may be ruinous." *Id.* at 369-70. Because *American Trucking's* retroactive rejection and the present case's retroactive voiding both raise the same basic concerns regarding overcharge liability. We agree with Riss that the validity of the voiding provision is governed by the test provided in *American Trucking*. *Accord Freightcor*, 969 F.2d 1563 (subjecting section 1312.4(d) to the *American Trucking* test). *But see Atlantis Express, Inc. v. Associated Wholesale Grocers, Inc.*, No. 92-1771, 1993 WL. 83831 (8th Cir. Mar. 26, 1993) (concluding scrutiny of section 1312.4(d) under *American Trucking* test unnecessary); *Jasper Wyman*, 1992 WL. 17399, at *7. We also agree, however, with K Mart's alternative argument that the voiding provision complies with the test set forth in that case.

The Court of Appeals for the Fifth Circuit has addressed this same issue and has determined that the ICC's discretionary power under section 1312.4(d) satisfies *American Trucking's* two-part test. *Freightcor*, 969 F.2d at 1568-72. We agree with the *Freightcor* analysis. As to the first criterion that the power must further a specific statutory mandate of the Commission, the court stated:

> [T]he congressional mandate to the ICC is that the Commission must maintain a fair and efficient transportation market, which, at the very least, does not permit secret negotiations and arrangements between carriers and shippers.

> [*See Maislin*, 497 U.S. at 130-31.] Mindful of this policy, the Commission is specifically under a statutory mandate to determine what information must be provided in every joint tariff and [to] provide mechanisms to ensure that this information is provided and is accurate. [49 U.S.C. § 10762(a)(i).] Pursuant to this obligation, we believe that there is a strong presumption that the Commission must require the disclosure of the identity of the carriers participating in every tariff.

Freightcor, 969 F.2d at 1571. The court determined that the power to void a tariff that refers to another tariff governing its terms, when the mandated participation in that governing separate tariff is unsupported by the required effective concurrence or power of attorney, furthers a specific statutory mandate by furthering the disclosure of the identity of carriers participating in governing separate tariffs. We agree that the first criterion of the *American Trucking* test is thus met in this case.

As to the second criterion that the ICC's exercise of power must be directly and closely tied to such a specific statutory mandate, the court stated:

> In fulfilling the statutory mandate, the Commission designated participation *via* concurrence or power of attorney. The ICC regulations prescribe a simple method for compliance with the statute and declare that tariff's that do not comply with important statutory mandates are void. Stated another way, the regulation defines the essential elements of an effective tariff that refers to other tariffs that govern its terms.

> Although the use of voiding as a method of [securing] compliance is potentially a harsh measure, we are satisfied that the Commission has not exceeded its discretion by determining that tariff's are void if they fail to comply with [regulatory provisions] that serve important statutory purposes.

Id. Thus, the court determined that the exercise of power is directly and closely tied to the statutory mandate. We agree that the second criterion of the *American Trucking* test is also met here. We therefore hold that under the *American Trucking* test the ICC has the discretionary power to void effective tariffs under section 1312.4(d).

2. Reversion to an Earlier Tariff for Rate Calculation

Riss's final argument grounded in *American Trucking* is based on the proposition that where a tariff is retroactively rejected and deemed void *ab initio*, the tariff in effect prior to the rejection becomes the applicable tariff for the period during which the motor carrier charged rates contained in the rejected tariff. *American Trucking*, 467 U.S. at 358. Riss contends that if ICC RISS 501-B is rejected for a lack of participation in ICC HGB 101-B, it should nonetheless be permitted to calculate undercharges based on ICC RISS 501-B and its apparently proper earlier participation in ICC HGB 100-A. Riss's argument is premised on substituting an earlier issue of HGB's tariff, which was in effect at the time when Riss was listed as a participant in HGB's tariff, for the issue of HGB's tariff that was in effect during the period when Riss was not listed as a participant.

This argument is mere sophistry. Section 1312.4(d) does not operate in the present case to void the latter issue of HGB's tariff; rather, section 1312.4(d) operates to declare Riss's own tariff. ICC RISS 501-B, void. We also note that, even had Riss proffered evidence of the existence of a Riss tariff preceding ICC RISS 501-B on which to base a calculation of rates, section 1312.4(d) does not render the tariff in question void *ab initio* in this case as the remedy under scrutiny did in *American Trucking*. Rather, section 1312.4(d) declares Riss's tariff void only from the moment in 1985 when Riss failed to maintain the necessary effective power of attorney. Because Riss's tariff is not void *ab initio*, there is no reason, as there may have been in *American Trucking*, to look to an earlier tariff for rate calculation.

In a broad sense, Riss argues that *American Trucking* requires it be allowed to calculate undercharges based on rates contained in whatever Riss tariff most recently complied with ICC regulations prior to the voiding. In the present case, however, those rates appear to be the very same rates contained in the void tariff, and Riss would consequently end up with exactly what it is prohibited from seeking under the void tariff itself. We therefore conclude that Riss's position is untenable because it would completely vitiate the remedial enforcement power contained in section 1312.4(d), a power we hold to be a proper exercise of the ICC's discretionary authority to nullify tariffs.

C. SUBSTANTIAL COMPLIANCE

Riss contends that ICC RISS 501-B should not be voided because is is in substantial compliance with ICC regulations and it therefore "trumps" section 1312.4(d) under the filed rate doctrine. Citing *Genstar Chemical Ltd. v. ICC*, 665 F.2d 1304, 1308 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 905 (1982), Riss asserts that a tariff on file with the ICC and not rejected at the outset is not to be disregarded or treated as nonexistent merely because of some element of substantive unlawfulness in the rate or some irregularity in tariff filing formalities. Here, however, we have neither. Instead, Riss's tariff was missing one entire and essential component of the two necessary to satisfy the fundamental purpose of tariff's, i.e., to disclose the freight charges due the carrier. *Jasper Wyman*, 1992 WL 17399, at 7.

Relying on the inference that at some time prior to HGB's cancellation on February 18, 1985. It had participated in HGB's distance guide tariff, Riss seems to argue that its former participation in the HGB tariff conferred upon it a right of perpetual participation. However, it is undisputed that Riss never transmitted any distance tariff to the Commission itself after HGB's cancellation, nor did it participate in the distance guides filed by any other carrier or agent. Consequently, Riss had no effective tariff by which any shipper or the Commission could ascertain its transportation charges. Riss's tariff, therefore, did not substantially comply at any time relevant to this case.

D. REMAND FOR THE FIXING OF A REASONABLE RATE

Riss contends on appeal that in any event is is entitled under 49 U.S.C.A. section 10701(a) to receive a reasonable rate for its services, which in this case allegedly may be more than the negotiated rate it received under the contract. It asserts, therefore, that if its tariff is deemed void pursuant to section 1312.4(d), then this court should remand the case to the district court with instructions to refer the case to the ICC to determine the reasonable rate to which it is entitled. We note that Riss's reading of section 10710(a) is questionable. We decline, however, to address this argument as it was not raised in the district court. *Newark Morning Ledger Co. v. United States*, 539 F.2d 929, 932 (3d Cir. 1976).

IV. CONCLUSION

We hold therefore that the ICC had the power to promulgate 49 C.F.R. section 1312.4(d) declaring void as a matter of law a tariff that is not in compliance with it. Riss's tariff ICC RISS 501-B failed to comply with this regulatory section, and was therefore void, at the time Riss performed the services at issue in this litigation. Consequently, although the filed rate doctrine mandates that carriers charge and shippers pay only the duly filed rate, Riss's purported tariff cannot be the basis for the computation of freight undercharges for services provided subsequent to the time it became void.

Accordingly, the summary judgment of the district court in favor of K Mart will be affirmed. Costs taxed against the appellant in favor of K Mart will be affirmed. Costs taxed against the appellant.

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No. 93-284

In The

Supreme Court of the United States

October Term, 1993

SECURITY SERVICES, INC.,

Petitioner,

v.

K MART CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S REPLY IN OPPOSITION

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QUESTION PRESENTED

Where a carrier's participation in the Household Goods Carriers' Bureau Mileage Guide Tariff was cancelled, is the carrier's continued use of that tariff a violation of the filed rate doctrine?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 996 F.2d 1516. The order and decision of the United States District Court for the Eastern District of Pennsylvania (Van Artsdalen, J.) granting summary judgment for Respondent is unreported. Both decisions are reproduced in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This case involves the application of the filed rate doctrine to rates based on mileages published by Petitioner, Security Services, Inc. f/k/a Riss International Corporation ("*Riss*"). However, Riss has the initial burden of proving it had an effective tariff on file with the I.C.C. to substantiate its undercharge claims. Riss filed a mileage rate tariff with the I.C.C. Mileage rates are composed of two components, both of which must be published in the carrier's tariff: 1) the rate per mile, and 2) a distance scale. In lieu of publishing its own distance scale, Riss opted to incorporate the Household Goods Carriers' Bureau's (HGCB) Mileage Guide Tariff No. 100 by reference thereto in its mileage rate tariff, as permitted by the I.C.C.'s tariff regulations.

The Interstate Commerce Commission's (I.C.C.) tariff regulations instruct how common carriers are to publish their rates in furtherance of the filed rate doctrine. These regulations require carriers who opt to publish rates based on mileages to also publish a distance scale in a tariff (mileage guide), and if they choose to refer to an agent's mileage tariff rather than publish their own, the carrier must participate in that mileage tariff.

Participation in joint tariffs must be accomplished by the execution of a power of attorney authorizing the publisher (agent) to list the carrier's name in the tariff as a participating carrier. The publishing agent's rules also require payment of an annual participation fee as a prerequisite to being listed as a participant. The I.C.C.'s regulations follow its 1939 directive warning carriers of

the dire consequences of failing to participate in referred-to tariffs published by agents.

Riss complied with all of the foregoing requirements until Feb. 19, 1985, when the Household Goods Carriers' Bureau deleted Riss from its Mileage Guide Tariff No. 100 for failure to pay the participation fee.[1] Riss's mileage rate tariff remained in effect *but was incapable of calculating freight charges thereafter due to the absence of a distance scale tariff filed with the I.C.C. in its name*. Stated differently, when Riss's participation in the HGCB Mileage Guide Tariff was terminated, its mileage rate tariff became incomplete, and thus void by operation of law.

The Third Circuit's decision below held that Riss lacked a complete tariff, and also upheld the I.C.C.'s power to promulgate the regulations declaring as void tariffs that are materially incomplete. That decision was the third decision by a Federal Circuit Court to do so.[2]

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[1] Several other carriers, apparently under severe financial pressure due to increased competition, failed to pay fees to the HGCB, and were deleted from the Mileage Guide. Their Trustees are similarly seeking undercharges. See **Appendix A**.

[2] *See Freightcor Services, Inc. v. Vitro Packaging, Inc.*, 969 F.2d 1563, *cert. denied*, 113 S. Ct. 979 (Jan. 11, 1993); *Atlantis Express, Inc. v. Associated Wholesale Grocers, Inc.*, 989 F.2d 281 (8th Cir. 1993); *F.P. Corporation v. Twin Modal, Inc.*, 989 F.2d 285 (8th Cir. 1993), *petition for cert. filed*, No. 92-2062.

However, the D.C. Circuit Court of Appeals[3] subsequently reversed the I.C.C.'s landmark decision in *Jasper Wyman*[4] where the I.C.C. interpreted its regulations as precluding carriers' reliance upon incomplete mileage rate tariffs as the basis for undercharges. Shortly thereafter, the Seventh Circuit[5] and the Sixth Circuit[6] felt constrained to follow *Overland* because the I.C.C. is bound to adhere to the D.C. Circuit's review of its regulations.

On August 6, 1993, the I.C.C. and the United States of America petitioned the D.C. Circuit for rehearing *Overland* with a suggestion for rehearing *en banc*. On August 17, 1993, the D.C. Circuit ordered, *sua sponte*, Overland Express to respond to the Government's petition. See **Appendix B**.

Although the Government has not participated in the proceedings below, it is contesting the circuit decisions challenging the I.C.C.'s regulations governing these cases. Therefore, the Court may deem it advisable to

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[3] *Overland Express, Inc. v. Interstate Commerce Commission*, 996 F.2d 356 (D.C. Cir. June 22, 1993), *rev'g. sub nom., Jasper Wyman & Son, et al. – Petition for Declaratory Order – Certain Rates and Practices of Overland Express, Inc.*, No. 40510, 8 I.C.C.2d 246 (Jan. 30, 1992).

[4] *Jasper Wyman & Son et al. – Petition for Declaratory Order – Certain Rates and Practices of Overland Express, Inc.*, 8 I.C.C.2d 313 (March 9, 1992).

[5] *Brizendine v. Cotter & Company*, ___ F.2d ___, 1993 WL 292348 (7th Cir. Aug. 5, 1993).

[6] *Security Services, Inc., f/k/a Riss International Corporation v. P-Y Transportation, Inc., f/k/a C.T.S. Brokerage, Inc.*, ___ F.2d ___, 1993 WL 325719 (6th Cir. Aug. 30, 1993) ("P-Y").

invite the Solicitor General to submit the Government's position on this case of first impression.

The Court may also wish to await the D.C. Circuit's disposition of the Government's petition for rehearing in *Overland* before acting on the instant petition.

ARGUMENT

I. AN INCOMPLETE TARIFF IS VOID AS A MATTER OF LAW.

Riss's trustee in bankruptcy is seeking approximately $555,000 in additional freight charges alleged to be due by application of its common carrier mileage rate tariff rather than contract[7] rates negotiated with and paid by K Mart between Nov. 3, 1986 and Dec. 29, 1989. However, the Trustee must first prove that Riss had a valid tariff on file with the I.C.C. *Carrier Traffic Service, Inc., v. Toastmaster, Inc.*, 707 F. Supp. 1498 (1989); *Vertex Corp. – Petition for Declaratory Order – Certain Rates and Practices of Southwest Equipment Rental, Inc. D/B/A Southwest Motor Freight*, 8 I.C.C.2d 701 (1992), 9 I.C.C.2d 688 (1993).

Riss's mileage rate tariff referred to the HGCB's Mileage Guide Tariff No. 100 filed with the I.C.C. as the uniform source for distances between the origins and

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[7] The courts below did not rule on Defendant/Respondent's defense that Riss performed these transportation services under its contract permit pursuant to a duly executed transportation contract. Summary judgment was granted solely on the Mileage Guide Tariff issue.

destinations served by Riss.[8] The I.C.C.'s tariff regulations require carriers choosing to publish rates in "cents per mile" to also publish a distance scale in a tariff. 49 C.F.R. § 1312.30(b). The object is to prevent discrimination and secret pricing made possible by applying shorter mileage routes for favored shippers. *Security Services, Inc. f/k/a Riss International Corp. v. K Mart Corp.*, 996 F.2d 1516 (3rd Cir. June 18, 1993) ("*K Mart*").

Although Riss originally participated in the HGCB Mileage Guide Tariff when it filed its mileage rate tariff ICC RISS 501-B effective Sept. 30, 1984, its name was deleted from HGCB's filed tariff listing of participating carriers in HGCB's Mileage Guide effective Feb. 19, 1985 due to its failure to pay the required participation fee for 1985. *Id.* at 1520, 1526. Respondent contends that as of that date, Riss's mileage rates became incomplete and thus, ineffective by operation of law. The Circuit Court below agreed, holding that:

> When a common carrier elects to file a distance rate tariff, as did Riss, it must provide **both** components to allow a shipper to calculate transportation costs for a given shipment. If a tariff is incomplete ~~because~~ one or the other of these components is missing, the shipper cannot put the tariff to its intended use.

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[8] The Circuit Court below held that the HGCB's Mileage Guide "is deemed a tariff in its own right," citing *Jasper Wyman* and *Freightcor. Security Services, Inc. f/k/a Riss International Corp. v. K Mart Corp.*, 996 F.2d 1516, 1521 (3rd Cir. June 18, 1993) ("*K Mart*").

Id. at 1521 (emphasis added). The Court then held:

> . . . Riss's tariff was missing one entire and essential component of the two necessary to satisfy the fundamental purpose of tariffs, i.e., to disclose the freight charges due the carrier. *Jasper Wyman*, 1992 WL 17399, at *7.
>
> Relying on the inference that at some time prior to HGB's cancellation on February 18, 1985, it had participated in HGB's distance guide tariff, Riss seems to argue that its former participation in the HGB tariff conferred upon it a right of perpetual participation. However, it is undisputed that Riss never transmitted any distance tariff to the Commission itself after HGB's cancellation, nor did it participate in the distance guides filed by any other carrier or agent. Consequently, Riss had **no effective tariff** by which any shipper or the Commission could ascertain its transportation charges. Riss's tariff, therefore, did not substantially comply at any time relevant to this case.

Id. at 1526 (emphasis added).

The foregoing facts and legal conclusions are simply an application of the filed rate doctrine as recently reaffirmed by this Court in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990) and *Reiter v. Cooper*, 113 S. Ct. 1213 (March 8, 1993).

The Commission's tariff regulations and its interpretations thereof in *Jasper Wyman* and its progeny are merely tools designed to implement the filed rate doctrine. Pursuant to the Congressional mandate expressed in 49 U.S.C. § 10762(b)(1), the Commission prescribed "the form and manner of publishing, filing, and keeping

tariffs open for public inspection . . . " by promulgating 49 C.F.R. Sections 1312.4(d), 1312.10(a), 1312.13(c), 1312.17(a-b), 1312.18, 1312.25(a), 1312.25(d), 1312.27(e), 1312.30(b), 1312.30(c) and 1312.30(c)(4).[9] Collectively, these sections govern how carriers must lawfully publish mileage rates and participate in joint tariffs, such as the HGCB Mileage Guide Tariff, if they choose this method of publication.

The Commission's regulations thus implement the filed rate doctrine by requiring carriers to be named in tariffs publishing *both* components of their mileage rates. These regulations assuredly were not promulgated as a defense to undercharges. As early as 1939, the Commission issued a warning to carriers about the effects of being cancelled from an agency tariff for failure to pay the required participation fees.[10] When the I.C.C. becomes aware of carrier noncompliance, it reacts. *See New England Motor Carrier Rates*, 8 M.C.C. 287, 304 (1938) (prohibiting use of tariff without participation); *Halliburton Co. v. Consolidated Copperstate Lines*, 335 I.C.C. 201, 107 (1969) (lack of participation in the tariff operated to defeat an undercharge claim); *Household Goods Carriers' Bureau, Inc. – Petition for Cancellation of Tariffs of Non-Participating Carriers*, 9 I.C.C.2d 378 (1993) (order directed at 111 carriers identified by HGCB as referring to, without participating in, the HGCB Mileage Guide Tariff);

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[9] All relevant tariff regulations are reproduced in **Appendix E**, beginning at App. 12.

[10] See F.R. Doc. 39-4016(Oct 30, 1939); 4 Fed. Reg. 4440 (Oct. 31, 1939), annexed as **Appendix C**.

National Motor Freight Traffic Association – Petition for Cancellation of Tariffs That Refer to the N.M.F.C. Classification, But Are Filed By or On Behalf of Non-Participating Carriers, 9 I.C.C.2d 186 (1992) (same as to 49 carriers identified as referring to, but not participating in, a commodity classification tariff filed by the National Motor Freight Classification Committee). Participation by carriers referring to the Mileage Guide Tariff was also mandated by a prominent note in the Mileage Guide Tariff.[11]

In 1984, the Commission revised its tariff regulations simplifying tariff procedures, but reiterated the requirement that carriers electing to publish mileage rates and utilize an agent's mileage guide for distances be listed as participating carriers in that mileage guide tariff.[12] 49 C.F.R. § 1312.27(e).

Absent effective powers of attorney to the publishing agent, or payment of participation fees, the tariff becomes inoperative and *the referring carrier's name will be deleted from the referred-to mileage guide tariff.* 49 C.F.R. 1312.4(d). The carrier's mileage rates then become incomplete

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[11] (From HGCB Mileage Guide Tariff, Supp. App. 41)

PARTICIPATING CARRIERS

For a list of participating carriers refer to "Participating Carrier and Scope Tariff No. ICC HGB 107-a, Household Goods Carriers' Bureau, Agent, Supplements thereto or reissues thereof.

NOTE: This mileage guide may not be employed by a carrier as a governing publication for the purpose of determining transportation rates based on mileage or distance unless carrier is shown as a participant in the above named tariff.

[12] *Ex Parte No. MC-370, Tariff Improvement*, 365 I.C.C. 43 (1981)

because a distance scale no longer exists *in the carrier's name* with which to multiply the mileage rates.

The Third Circuit affirmed the District Court's grant of summary judgment to K Mart because Riss's tariff was incomplete. To the same effect are *Freightcor*, *Atlantis* and *F.P. Corp.*

II. THE COMMISSION'S REGULATIONS REFLECT THE CONGRESSIONAL POLICY AGAINST SECRET, DISCRIMINATORY RATES

The Third Circuit recognized the potential for the discriminatory use of mileage rates in the absence of a *filed* distance scale published in the name of the carrier:

> Because the number of miles between two points will vary depending on the route chosen, specification of that number [in a tariff] precludes a carrier from favoring one shipper over another by calculating a lower charge for the favored shipper based on a shorter route. This promotes Congress's policy of preventing price discrimination.

K Mart at 1520-1521.

The reason for this requirement is succinctly explained in *Tri-State Motor Transit Co. v. U.S.*, 490 F.2d 996 (8th Cir. 1974), wherein the Court stated:

> Mileage Guide No. 8 when incorporated into the provisions of a Tariff **creates certainty** in the computation of mileage-distance from point of origin to destination. As provided in the guide, the determination of mileage made pursuant to its Rules is applicable regardless of the Route

> actually traveled by the carrier. The certainty of this method of distance-mileage computation should only be abolished by a clear and specific exception in the terms of the Tariff.

Id. at 997 (emphasis added).

Once Riss's name was deleted from the HGCB Mileage Guide Tariff, it lost the required certainty of rates mandated by the filed rate doctrine, and its mileage rates became void. The fundamental reason for these tariff regulations requiring publication and filing with the I.C.C. of *all* elements of the rate necessary for the computation of charges is to prevent opportunities for discrimination. If Riss, for instance, was not bound to apply only the distances published in the HGCB Mileage Guide Tariff 100, it would be free to give favored shippers a *reduction of $73 per truckload* simply by reducing by one mile the published distance between a given origin and destination, thus dropping the mileage rate into the lower mileage bracket.[13] The I.C.C.'s regulations, therefore, are necessary to implement the filed rate doctrine, thus preventing discrimination.

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[13] Using Riss's mileage rate scale in ICC RISS 501-B, Item 161 (annexed as **Appendix D**), the charge would be $1828 for a movement stated in the HGCB tariff to be 1,001 miles between a given origin and destination. If the carrier is not bound by this tariff-imposed distance, the carrier could use 1,000 miles, thus reducing the charge to $1755, a savings of $73 per 40,000 lb. truckload. (Joint Appendix p. 111.) The Rate Base Numbers as used in Item 161 are equivalent to the mileages shown in HGB 100, per Riss 501-B, page 11. (JA 112)

III. PETITIONER'S RELIANCE UPON THIS COURT'S DECISION IN *I.C.C. V. AMERICAN TRUCKING ASSOCIATION* IS MISPLACED

The main thrust of Petitioner's position is that this Court's decision in *I.C.C. v. American Trucking Associations, Inc.*, 467 U.S. 354 (1984) ("*ATA*") precludes the I.C.C. from retroactively rejecting an effective tariff. Petitioner argues that since the I.C.C. accepted Riss's mileage rate tariff for filing, it may not now declare it void by operation of 49 C.F.R. § 1312.4(d). Petitioner is wrong on two counts: 1) an *incomplete* tariff is void by reason of the carrier's omission, not by any act of the Commission; and 2) there was no cause for rejecting Riss's tariff when originally filed because Riss was a participant in the HGCB mileage Guide Tariff 100 at that time. *K Mart* at 1520, 1526. Nor was it necessary for the I.C.C. to take any action when Riss was later deleted from the Mileage Guide Tariff. Riss's mileage rates were rendered void by its agent's cancellation of a published scale of distances for Riss's account. Thereafter, Riss lacked a uniform scale of distances to be multiplied by the mileage rate to calculate total charges.

Furthermore, 49 U.S.C. § 10762(e) does not require the Commission's rejection of an incomplete tariff. The statute is merely permissive.[14]

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[14] 49 U.S.C. § 10762(e) provides that

> The Commission **may** reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section. (emphasis added)

As a practical matter, it would have been extremely difficult, and costly, for the Commission to monitor every cancellation supplement filed by the HGCB to determine whether the delinquent carriers had filed another method of computing distances simultaneously with their cancellation from HGCB 100. As the Court observed in *ATA*, at 360, n. 4, the I.C.C. discontinued scrutinizing every tariff filing in 1979 due to budget cutbacks and reductions in personnel. Given the number of participants in the HGCB Mileage Guide Tariff 100 (approximately 12,800), monitoring that tariff alone would have been a Herculean task for the Commission and an unacceptable burden on taxpayers.[15] However, this should not relieve carriers from their responsibility to comply with the I.C.A. and I.C.C. regulations.

None of the cases cited by Petitioner in support of its "retroactive rejection" argument involved *incomplete* tariffs. *Genstar Chemical, Ltd. v. I.C.C.*, 665 F.2d 1304 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 905 (1983), involved the publication of a *complete* rate which was increased 14% rather than the 12% increase authorized by the I.C.C. The Court upheld the I.C.C.'s awarding a shipper only the 2% difference rather than refunding the entire 14% contained in the defectively filed tariff. *Davis v. Portland Seed Co.*,

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[15] The obligation to police lawful participation in the HGCB Mileage Guide Tariff was on HGCB as the publisher, not the I.C.C., as the HGCB derives funds for the compilation of its voluminous Mileage Guide from its dues and participation fees. The HGCB has since recognized its obligation by petitioning the I.C.C. to strike delinquent carriers' tariffs from the I.C.C.'s files. See petitions for *Cancellation of Tariffs* cited at page 8 herein.

264 U.S. 403 (1924) involved a *complete* rate filed in violation of the long-and-short haul statute. *Berwind-White Coal Mining Co. v. Chicago & E.R.R.*, 235 U.S. 371 (1914) involved the filing of a demurrage rate sheet with the I.C.C. Since each of these cases involved *complete* rates from which freight charges were readily calculated despite their technical violations of the Commission's regulations, they are inapposite to the case at bar.

Petitioner wrongly characterizes the Fifth Circuit's decision in *Freightcor* as relying solely on the National Transportation Policy as justification for retroactively rejecting Freightcor's tariffs. On the contrary, the Fifth Circuit held:

> In sum, the congressional mandate to the ICC is that the Commission must maintain a fair and efficient transportation market, which, at the very least, does not permit secret negotiations and arrangements between carriers and shippers. Mindful of this policy, the Commission is specifically under a statutory mandate to determine what information must be provided in every joint tariff and provide mechanisms to ensure that this information is provided and is accurate. Pursuant to this obligation, we believe that there is a strong presumption that the Commission must require the disclosure of the identity of the carriers participating in every tariff.

Id. at 6738.

The Third Circuit concurred with the Fifth Circuit's analysis (*K Mart*, at 1525) and also concurred in the Fifth Circuit's finding that the I.C.C. met the second criterion:

> In fulfilling the statutory mandate, the Commission designated participation *via* concurrence or

powers of attorney. The ICC regulations prescribe a simple method for compliance with the statute and declare that tariffs that do not comply with important statutory mandates are void. Stated in another way, the regulation defines the essential elements of an effective tariff that refers to other tariffs that govern its terms.

Although the use of voiding as a method of compliance is potentially a harsh measure, we are satisfied that the Commission has not exceeded its discretion by determining that tariffs are void if they fail to comply with formalities that serve important statutory purposes.[13] A stricter corrective measure – voiding tariffs *and* giving shippers an explicit right to overcharges – was upheld by the Supreme Court in *American Trucking* to remedy non-conforming tariffs. *American Trucking*, 467 U.S. 370, 104 S.Ct. at 2467. The public policy that the Commission seeks to enforce through the exercise of this mandate is one that has long been integral to the regulation of interstate commerce: the prevention of secrecy in the dealings among carriers and between carriers and favored shippers. Thus, we conclude that section 1312.4(d) was within the Commission's statutory authority.

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[13] We note that, of the vast number of technical requirements the Commission has placed on tariffs, only the requirement of formal participation is enforced with the voiding mechanism. We find no other regulation in which the ICC currently requires a carrier to comply with the regulation or find that its non-conforming tariff is "void as a matter of law."

Petitioner's rhetoric regarding the I.C.C.'s acceptance of tariffs with "irregularities" is to no avail in this case. Since freight charges cannot be calculated with only one half of the equation required by the terms of the tariff, the tariff is incomplete. Riss's violation goes to the heart of the filed rate doctrine as embodied in the Commission's regulations, and is distinguishable from the technical, superficial defects contemplated in *Genstar*, *Davis* and *Berwind-White*.

If the term "miles" is ambiguous, as suggested by Petitioner at p. 13 of its Petition for Writ of Certiorari, it is a general principle of tariff construction that ambiguities are to be resolved against the framer of the tariff (and its successor-in-interest). *Penn Central Co. v. General Mills, Inc.*, 439 F.2d 1338, 1341 (8th Cir. 1971).

Contrary to Petitioner's assertion, Congress did not intend to restrict the Commission's discretionary powers to those provided in 49 U.S.C. § 10762(e). (Petition for Writ of Certiorari at 8.) See n. 14 herein. The Court below did not interpret this section as prohibiting the Commission's promulgation of § 1312.4(d). It stated:

> Here, the remedy the ICC adopted under section 1312.4(d) is not the exercise of the power of rejection; rather it is a remedial power to declare a tariff void from the moment a carrier does not effectively concur or maintain a power of attorney to support its participation in a governing separate tariff. The remedial power in this case is in some respects broader than the remedy examined in *American Trucking*: it not only would apply to void a tariff ab initio because an effective concurrence or power of attorney did not exist when the tariff was filed; *it also allows the voiding of a tariff that was originally accompanied by the required concurrence or power of attorney at some later date if the concurrence or power of attorney becomes ineffective.*

K Mart, at 1524 (emphasis added). Thus, Riss's tariff 501-B was properly accepted for filing by the I.C.C. on August 20, 1984, became effective on Sept. 20, 1984, and was a complete tariff because Riss was a participant in HGCB 100 on that date. However, when Riss was deleted from HGCB 100 effective Feb. 19, 1985, its rate tariff was incapable of computing freight charges, and thus was ineffective and void.

IV. THE D.C. CIRCUIT'S DECISION IN *OVERLAND v. I.C.C.* UNDERCUTS THE FILED RATE DOCTRINE, AND THEREFORE, IS NOT CONTROLLING

As of this writing, the finality of the D.C. Circuit's decision in *Overland v. I.C.C.*, 996 F.2d 356, is pending because of a petition for rehearing. If *Overland* is reconsidered by the Circuit and reversed, as requested by the Government and Intervenors therein, the Sixth and Seventh Circuits which relied heavily on *Overland* may also be reconsidered and reversed, thus removing the divergent opinions of the Circuits. Respondent suggests, therefore, that it may be premature to rule on Petitioner's writ of certiorari until the D.C. Circuit disposes of *Overland*.

Overland is manifestly erroneous in that the Court *created* a distance guide tariff for Overland Express when none existed *in its name* in the I.C.C.'s official tariff file

after its participation was cancelled. Doing so contravenes this Court's admonition that "a federal court has no jurisdiction to enter an order that operates to fix rates." *Burlington Northern Inc. v. United States*, 459 U.S. 131, 140 (1982). That power is reserved solely to the I.C.C. The HGCB's cancellation of Overland's participation in its Mileage Guide Tariff was notice to Overland *and its shippers* that Overland could no longer use the distances in that guide for the computation of mileage rate charges. (See also the "Note" in the HGCB Mileage Guide Tariff, n. 11 herein.) The fact that Overland's rate tariff *remained* on file is irrelevant because it was lacking a lawful distance guide.

Illustrative of the D.C. Circuit's mis-understanding of how the filed rate doctrine works in this context, is the court's holding that

> The Carriers and the shippers are bound by that which is openly disclosed so as to prevent price discrimination. That purpose is hardly served, indeed it is undermined, by an ICC policy that would make the disclosed rate unreliable unless a shipper took the extraordinary step of determining whether a carrier's tariff filing was defective *because its power of attorney was not up to date.*

Overland, at 361 (emphasis added).

The law does not require shippers to look for carriers' powers of attorney to determine if a carrier is a party to a referred-to tariff. The law charges shippers with constructive notice only of *filed tariffs*, not powers of attorney which are *not* filed with the Commission. They are given to the publishing carrier along with the

required participation fee to authorize the tariff publisher to publish the carrier's name in the referred-to tariff as a participating carrier. *Jasper Wyman* at 253.

Only after receipt of the power of attorney and annual fee is that carrier listed in the referred-to tariff. It is immaterial whether or not shippers actually check the tariff, because shippers are charged with constructive notice of the contents of the tariff. *Maislin*, 127. *Absent a carrier's name in a tariff, that carrier may not rely upon that tariff as its own.*

Overland's name was not published as a participating carrier in the mileage guide and therefore the filed rate doctrine prohibits its use of the mileage rate tariff referring to the uniform mileage tariff – a necessary component of mileage rates.

This misapprehension of the role of powers of attorney when carriers elect to participate in joint tariffs was shared by the Seventh Circuit in *Brizendine*. See Petitioner's Petition for Writ of Certiorari, p. 16-17. The Third Circuit addressed this issue by discussing the roles of principals and agents. The Court concluded that Riss revoked its power of attorney

> . . . when it failed to make the required payment of participation fees because its failure to pay constituted conduct inconsistent with the continuance of its consent. We conclude that this manifestation of revocation rendered ineffective any power of attorney Riss may have issued. . . . HGB's cancellation of Riss's participation in its tariff unquestionably is conduct inconsistent with the continued performance of HGB's duties to Riss. Thus, we also conclude that, even absent

> a revocation by Riss, HGB's cancellation operated as a renunciation of authority rendering ineffective any power of attorney Riss may have once executed. . . . The filed rate doctrine . . . charges carriers and shippers alike with constructive knowledge of filed tariffs. HGB's cancellation, *filed in a supplement to its tariff*, afforded Riss sufficient notice of both the cancellation and HGB's renunciation of any power of attorney that may once have existed. *Jasper Wyman . . . A holding to the contrary would vitiate the filed rate doctrine.*

K Mart at 1523 (emphasis added).

> Under the relevant law, Riss's tariff was void when K Mart made its shipments in 1986 through 1989 because any power of attorney it previously may have issued became ineffective in 1985, 49 C.F.R. § 1312.4(d), and a void tariff cannot support the undercharges Riss seeks. . . .

Id. at 1524 (citations omitted). There is no "perpetual participation" in agents' tariffs. *Id.* at 1526.

Respondent respectfully submits that the Third Circuit's understanding of the use of powers of attorney with respect to joint tariffs is in accord with the law and that the D.C. Circuit's view violates the filed rate doctrine. The filed rate doctrine may be harsh on shippers, but it also governs carriers and their Trustees as well.

Overland also mischaracterized the Commission's mandate when it considered the *ATA* criteria for rejecting tariffs. (See Petitioner's Petition for Writ of Certiorari p. 15.) Although Respondent herein does not concede that *ATA* is applicable, the Commission's statutory mandate is

to regulate the publication of tariffs, in this case *joint* tariffs. See 49 U.S.C. § 10705(b)(1).

Brizendine (Trustee for Brown Transport) v. Cotter & Company, ___ F.2d ___, 1993 WL 292348 (7th Cir. Aug. 5, 1993), also misstates this Court's decision in *Maislin* by holding:

> *Maislin* adds that the filed rate doctrine trumps any contrary regulation promulgated by the I.C.C.

Id., 1993 WL 292348 *5. But the Commission's tariff regulations requiring the publication of distance scales is not contrary to the filed rate doctrine – it implements the doctrine. The Seventh Circuit's misapprehension is further illustrated by its statement that

> Again, Brown's tariff rate was not secret; anyone who consulted it could compute the price of shipping. The presence or absence of a separately filed power of attorney would change nothing.

Id., 1993 WL 292348 *6. On the contrary, *no one* who consulted Brown's filed tariff could calculate the lawful freight charges due on any given shipment without a uniform scale of distances published in Brown's name because it published only a rate per mile. The Sixth Circuit was similarly misled by *Overland*.

> While this court is not required to follow *Overland*, the ICC is. Since *Overland* will require the ICC to revisit the conclusions it reached in *Jasper Wyman*, we adopt the reasoning of the D.C. Circuit in *Overland*, and hold that so long as Security's tariff documents were received and placed on file by the ICC without any objection as to

> their form, and were adequate to give notice of the rate to be charged, the filed rate doctrine applies, and Security may rely upon the filed rates in a suit to collect undercharges. *Overland*, 1883 U.S. App. LEXIS 14833 at *18.

Security Services v. P-Y Transp., 1993 WL 325719 *4. Thus, the Court failed to realize that the "rate to be charged" is useless without a uniform distance scale in the carrier's tariff.

Even if a filed rate were involved, the rule would not *per se* contravene *Maislin*. While *Maislin* reaffirmed a carrier's right and duty to collect filed rates, 497 U.S. at 126-133, it also confirmed that carriers must comply with other express requirements of the Act, 497 U.S. at 128. Any doubt on this point was dispelled in *Reiter v. Cooper*, where the Court explained:

> The filed rate doctrine embodies the principle that a shipper cannot avoid payment of the tariff rate by invoking common-law claims and defenses such as ignorance, estoppel, or prior agreement to a different rate. . . . It assuredly does *not* preclude avoidance of the tariff rate, however, through claims and defenses that are specifically accorded by the [Act] itself.

Reiter at 1219.

In *I.C.C. v. Transcon Lines*, this Court vacated and remanded a Ninth Circuit ruling that the filed rate doctrine "trumps" the I.C.C.'s credit regulations. 990 F.2d 1503, 1513-1515, 61 U.S.L.W. 3684 (U.S. June 14, 1993) (No. 92-1547).

As in *Reiter* and *Transcon*, the powers asserted by the I.C.C. here are "specifically accorded" by the Act: in this

case, the authority to prescribe the manner of tariff filing, 49 U.S.C. § 10762(b)(1) and necessary tariff information, 49 U.S.C. § 10762(a)(1), to promulgate implementing rules, 49 U.S.C. § 10321(a), and to enforce those rules, 49 U.S.C. § 11702(a)(5). The Commission promulgated regulations pursuant to these sections of the Act and in the spirit of the filed rate doctrine's public notice requirement. *K Mart* at 1521 (discussion of relevant regulations).

V. DEFERENCE MUST BE GIVEN TO ADMINISTRATIVE AGENCY REGULATIONS AND ITS INTERPRETATION THEREOF

When a court determines Congress has not directly addressed the precise question in issue, it may not impose its own construction on the statute. The question for the court is "whether the agency's answer is based on a permissible construction of the statute". *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). In the case at bar, the I.C.C. promulgated tariff publishing regulations in response to Congress's mandate to implement the filed rate doctrine. Thus, the I.C.C. formulated rules to fill the gap left by Congress. With respect to tariff construction rules, there was an express delegation of authority to the Commission. 49 U.S.C. § 10762(a)(1) specifically requires motor common carriers to publish and file tariffs containing rates, and empowers the I.C.C. to "prescribe other information that motor common carriers *shall* include in their tariffs." 49 U.S.C. § 10762(a)(1) (emphasis added).

In response to this express delegation of authority, the I.C.C. crafted 49 C.F.R. § 1312 based on its extensive

experience and expertise in rates and tariffs. The Third Circuit's decision below carefully considered the I.C.C.'s interpretation, in *Jasper Wyman*, of its regulations governing mileage rates and incorporating agents' tariffs by reference, and concluded that the Commission's regulations and interpretations were sound and in accord with its Congressional mandate. *K Mart* at 1524-1527.

Agency rules must be affirmed unless arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. 706(2)(A); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 749 (1972). This standard is extremely deferential and narrow; it forbids courts to inquire into whether the agency's decision is wise as a matter of policy, for that is left to the discretion and developed expertise of the agency. *Id.* To fall short of this deferential standard, the agency's explanation must be "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983). This is particularly so where, as here, Congress has specifically charged the agency to establish rules (in this case to govern tariff filing, 49 U.S.C. § 10762(b)(1)); in this situation this Court has found the agency to be operating "at the zenith of its powers" and its regulations to be "entitled to 'more than mere deference or weight.' " *See American Trucking Ass'ns. v. United States*, 627 F.2d 1313, 1320 (D.C. Cir. 1980), citing *Batterton v. Francis*, 432 U.S. 416, 426 (1977).

> [W]hen construction of an administrative regulation rather than a statute is in issue, deference to administrative interpretation is even more clearly in order. . . . 'The ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.' . . . .

Udall v. Tallman, 380 U.S. 1, 16-17 (1965).

In *Jasper Wyman*, the Commission gave full effect to the plain meaning of the word "void" in § 1312.4(d). That interpretation clearly does not conflict with the "plain language" of the relevant regulations. *See National Railroad Passenger Corp. v. Boston & Maine Corp.*, 112 S. Ct. 1394 (March 25, 1992).

CONCLUSION

This Court recently insisted upon a strict application of the filed rate doctrine when carriers and their successors in interest seek the collection of undercharges. *Maislin*, at 130. Respondent herein is entitled to the same standard when applied to Petitioner's mileage rate tariff upon which its claims are based.

The Third Circuit, as well as the Fifth and Eighth Circuits, recognized that when carriers' participation in the HGCB's Mileage Tariff expires, the carrier no longer has a uniform scale of distances in a filed tariff, and therefore, its mileage rates are incomplete. Without a complete tariff on file, Petitioner has no cause of action.

Because the Third Circuit's decision below accords with the filed rate doctrine, the Court need not grant *certiorari* unless the D.C. Circuit refuses to rehear and reverse *Overland v. I.C.C.*, which was relied upon by the Sixth and Seventh Circuits. If, however, rehearing is

denied by the D.C. Circuit, *certiorari* should be granted in this case to resolve the conflict among the Circuits.

Respectfully submitted,

WILLIAM J. AUGELLO

September 17, 1993

APPENDIX A

CARRIERS THAT DID NOT PARTICIPATE IN AGENTS' TARIFFS REFERRED TO IN THEIR TARIFFS

American Eagle Lines
ATF Trucking Co., Inc.
BGR Transportation Co., Inc.
Brown Transport Truckload, Inc.
Canny Trucking Co., Inc.
Casket Distributors
Columbia Navigation
Country Wide Trucking
Cross E Transportation
Emporia Truck Lines
Express Transportation Co.
F.P. Corp.
Freightcor Services, Inc.
J. H. Ware
Mistletoe Transportation
Mitchell Trucking
Northeast Carriers, Inc.
Overland Express, Inc.
R.W. Joyce
Riss International Corp.
Rose Freight Lines
Rose-Way, Inc.
Sam Tanksley Trucking, Inc.
Silvey Refrigerated Carriers, Inc.
Sooner Express
Squaw Transit Co.
Transportation Systems International, Inc.
True Transport Co.
Twin Continental
United Shipping
Winning Run, Inc.
Zurek Express

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-1037

Overland Express, Inc., September Term, 1992

Petitioner

v.

Interstate Commerce Commission,

Respondent

ORDER

(Filed Aug. 17, 1993)

It is Ordered, *sua sponte*, that petitioner respond to respondents' suggestion for rehearing *en banc* and do so on or before September 3, 1993.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX C

INTERSTATE COMMERCE COMMISSION.

CANCELLATION OF PARTICIPATION IN AGENCY TARIFFS

OCTOBER 30, 1939.

To All Motor Carriers Subject to Section 217 of the Motor Carrier Act. 1935:

So many tariff complications and possibly unwitting violations of the law result from the cancelation of the participation of motor carriers in agency tariffs, including classification publications, that it is necessary to call the attention of all interstate common carriers by motor vehicle and their publishing agents to their obligations in this respect.

The law requires that all common carriers shall file with the Commission, and keep open to public inspection tariffs containing all their rates, fares, and charges for transportation and all services in connection therewith. Many carriers have complied with this obligation by participating in agency tariffs filed by agents who act in accordance with the by-laws of bureaus, conferences, or other organizations of motor carriers. Upon failure of a carrier to pay the established dues of such organization, or to comply with the by-laws, in many instances the agent proceeds to cancel the carrier's participation in the agency issues. Such cancelation makes the use of rates in such tariffs by that carrier unlawful. It is likewise unlawful for common carriers to perform interstate transportation without lawful rates on file covering the services performed. Therefore, the carrier must arrange to establish, effective on the same date that its participation in the

agency issue is canceled, rates for the transportation services which it may lawfully perform and for which it does not otherwise have rates filed.

An individual carrier may publish its own tariffs to take the place of those formerly published by its agent, or it may arrange to have its rates published by another agent, or republished by the agent who canceled them.

A tariff containing a classification of commodities is actually a part of any class rate tariff which is made subject to such classification tariff. Therefore, a carrier that is a party to a rate tariff which refers to a classification tariff must also be a party to the classification tariff.

If a carrier's participation in a classification tariff is canceled, that carrier's class rate tariff then becomes incomplete because there is no proper method of determining the commodities upon which the various class rates apply. Therefore, if a carrier's participation in the classification tariff is cancelled, it is necessary that the carrier publish an individual classification of commodities, or arrange for participation in some other classification tariff, or be reinstated in the tariff from which it has been canceled. In instances where a carrier elects to use a different classification, it will be necessary for the carrier to correct each of its class rate tariffs to provide reference to the new classification tariff to which the rate tariffs are made subject.

It should not be assumed that the Commission will grant special permission for the reestablishment of canceled carrier rates or reinstatement of canceled carrier participation in agency issues on short notice when the carrier's participation has been canceled because of a

controversy between a carrier and its agent, bureau, or association. Therefore, any agent who proposes to cancel the participation of a carrier in his class tariff or classification should notify the carrier of such proposed cancelation sufficiently in advance of the effective date thereof to permit the carrier to file an individual tariff or arrange with another agent for the publication of its rates on full statutory notice, effective on the same date as that of cancelation. The agent should also furnish the carrier with a sufficient number of copies of the canceling publication, to permit proper posting.

[SEAL]

W.P. BARTEL,
Secretary.

(P.R. Doc. 39-4016: Filed, October 30, 1939: 12:36 p.m.]

4 Fed. Reg. 4440 (Oct. 31, 1939)

APPENDIX D

RISS INTERNATIONAL CORPORATION
Tariff No. 501-B
APPLICATION OF RATES

ITEM 161

APPLICATION OF RATES (Applicable only where reference is made hereto) . . .

Where reference is made hereto, the charge will be as shown in Part A but, in no case less than the charge shown in Part B of this item.

PART A

When Applicable Rate Basis Number Is:	CHARGE Shall Be:
1 to 50	364.00
51 to 100	438.00
101 to 150	516.00
151 to 200	583.00
201 to 250	657.00
251 to 300	730.00
301 to 350	802.00
351 to 400	877.00
401 to 450	949.00
451 to 500	1021.00
501 to 550	1096.00
551 to 600	1169.00
601 to 650	1243.00
651 to 700	1315.00
701 to 750	1389.00
751 to 800	1463.00
801 to 850	1535.00
851 to 900	1609.00
901 to 950	1682.00
951 to 1000	1755.00
1001 to 1050	1828.00

1051 to 1100	1891.00
1101 to 1150	1975.00
1151 to 1200	2049.00
1201 to 1250	2121.00
1251 to 1300	2194.00
1301 to 1350	2268.00
1351 to 1400	2340.00
1401 to 1450	2413.00
1451 to 1500	2487.00
1501 to 1550	2561.00
1551 to 1600	2633.00
1601 to 1650	2707.00
1651 to 1700	2780.00
1701 to 1750	2853.00
1751 to 1800	2926.00
1801 to 1850	2999.00
1851 to 1900	3072.00
1901 to 1950	3146.00
1951 to 2000	3219.00
2001 to 2050	3292.00
2051 to 2100	3366.00
2101 to 2150	3438.00
2151 to 2200	3511.00
2201 to 2250	3585.00
2251 to 2300	3659.00
2301 to 2350	3732.00
2351 to 2400	3805.00
2401 to 2450	3878.00
2451 to 2500	3951.00
2501 to 2550	4024.00
2551 to 2600	4097.00
2601 to 2650	4172.00
2651 to 2700	4244.00
2701 to 2750	4317.00
2751 to 2800	4391.00
2801 to 2850	4464.00
2851 to 2900	4536.00

2901 to 2950	4610.00
2951 to 3000	4683.00
3001 to 3050	4756.00
3051 to 3100	4830.00
3101 to 3150	4903.00
3151 to 3200	4976.00
3201 to 3250	5049.00
3251 to 3300	5122.00
3301 to 3350	5195.00
3351 to 3400	5269.00
3401 to 3450	5342.00
3451 to 3500	5415.00

Issued: August 28, 1986

Effective: September 3, 1986

Issued By: Robert L. Burns, Traffic Manager,
P.O. Box 100, Kansas City, Mo 64141
For explanation of abbreviat symbols, see page 3.

APPENDIX E

STATUTES INVOLVED

5 U.S.C. § 706. Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

49 U.S.C. § 10321. Powers

(a) The Interstate Commerce Commission shall carry out this subtitle. Enumeration of a power of the Commission in this subtitle does not exclude another power the Commission may have in carrying out this subtitle. The Commission may prescribe regulations in carrying out this subtitle.

49 U.S.C. § 10705. Authority: through routes, joint classifications, rates and divisions prescribed by Interstate Commerce Commission

(b)(1) The Interstate Commerce Commission may, and shall when it considers it desirable in the public interest, prescribe through routes, joint classifications,

joint rates (including maximum or minimum rates or both), the division of joint rates, and the conditions under which those routes must be operated, for a motor common carrier of property providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title with another such carrier or with a water common carrier of property.

49 U.S.C. § 10741. Prohibitions against discrimination by common carriers

(b) A common carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title may not subject a person, place, port, or type of traffic to unreasonable discrimination. However, subject to subsection (c) of this section, this subsection does not apply to discrimination against the traffic of another carrier providing transportation by any mode.

49 U.S.C. § 10761. Transportation prohibited without tariff

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the

use of a facility that affects the value of that transportation or service, or another device.

49 U.S.C. § 10762. General tariff requirements

(a)(1) . . . A motor common carrier shall publish and file with the commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs.

49 U.S.C. § 10762(b)(1) The Commission shall prescribe the form and manner of publishing, filing, and keeping tariffs open for public inspection under this section.

49 U.S.C. § 11702. Enforcement by the Interstate Commerce Commission

(a) The Interstate Commerce Commission may bring a civil action –

(4) to enforce this subtitle (except a civil action under a provision of this subtitle governing the reasonableness and discriminatory character of rates), or a regulation or order of the Commission or a certificate or permit issued under this subtitle when violated by a motor carrier or broker providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title . . .

REGULATIONS CITED

49 C.F.R. § 1312.4(d): *Concurrences and powers of attorney.* Concurrences and powers of attorney shall not be filed with the Commission. However, a carrier may not participate in a tariff issued in the name of another carrier or an agent unless a power of attorney or concurrence has been executed. Absent effective concurrences or powers of attorney, tariffs are void as a matter of law. Should a challenge to a tariff be made on this basis, carriers will be required to submit the necessary proof. See also § 1312.10.

49 C.F.R. § 1312.10(a): *Powers of attorney.* Powers of attorney may be given by a carrier to a carrier or an agent for the purpose of publishing and filing tariffs. . . . The power may be as broad or limited as expressed in the document, and alternate agents may be named. **Powers of attorney shall not be filed at the Commission, but shall be maintained and produced if requested by any person.** Revocation or amendment of the power of attorney should be reflected through lawfully published tariff revisions effective concurrently. In the event of failure to so revise the applicable tariff or tariffs, the rates in such tariff or tariffs will remain applicable until lawfully changed. If the scope of a power of attorney is questioned by any person, the document shall be produced. (emphasis added)

49 C.F.R. § 1312.13(c) ***Participating carriers.*** **(1)** (This paragraph does not apply to carriers' local tariffs.) Unless a separate participating carrier's tariff is filed, a list of the participating carriers shall be provided, showing the names of the carriers; the city and state of the principal

office of the carrier; and the lead docket number of each carrier's operating authority, if any.

49 C.F.R. § 1312.17 Amendments (a) *How made.* An amendment is a change in, addition, or cancellation from a tariff. Supplements are tariff publications to be used to amend bound tariffs (see § 1312.18) and new or revised pages are tariff publications to be used to amend looseleaf tariffs (see paragraph (d) of this section). Supplements may also be used to amend looseleaf tariffs as provided in paragraph (d)(16) of this section.

(b) *Lists of participating carriers.* (This paragraph does not apply to participating carrier tariffs.)

(1) In bound tariffs, the list shall be amended by –

(i) Publishing a complete new list containing all changes and canceling the prior list; or

(ii) Publishing a cumulative list of all changes, alphabetically arranged either by code or carrier name, and the statement: "The list of participating carriers is as shown in the tariff except for the following changes." Only one cumulative list may be in effect at one time. A carrier's participation shall be canceled by showing the carrier's complete name, together with the word "Cancel" or other suitable provision. Changes shall be carried forward in subsequent amendments to the list as reissued matter.

(2) In a looseleaf tariff, the list shall be amended either by (i) republication of the page(s) on which the list appears, indicating the cancellations, additions and

changes. The canceled carriers' names shall be republished on a separate page(s) at the end of the list, indicating when the cancellation was first effective, until all provisions in the tariff referring specifically to the carrier(s) have been removed from the effective pages. The pages containing the list shall refer to the page(s) with an appropriate symbol to show elimination of a carrier.

(3) Concurrent with the cancellation of a carrier from the participating carrier list, all provisions specifically referring to that carrier shall be appropriately amended unless –

(i) The cancellation is in connection with the publication of a complete adoption of the rates of that carrier by another (see § 1312.20); or

(ii) The method permitted in paragraph (b)(4) of this section is used.

(4) A carrier's participation may be canceled by publishing a blanket cancellation notice directly with the list of participating carriers, and referring to the notice when canceling the carrier's name from the list. If this method is used, all provisions specifically referring to that carrier shall be amended as soon as possible. During the interim, an item or provision which specifically refers to that carrier may not be republished unless the reference is concurrently removed.

49 C.F.R. § 1312.18 Supplements

(a) *Changing provisions of a bound tariff.* A supplement may be used to add, delete or change provisions of a bound tariff. General rules, in addition to rules applicable to tariffs as a whole, are provided below.

49 C.F.R. § 1312.25(a) *Separate tariffs may be filed by agents.* (1) An alphabetical list of carriers participating in agent's tariffs, along with a description of the underlying tariffs, may be filed in a separate tariff(not a rate tariff). The title page of the participating carrier tariff shall state that it applies only in connection with tariffs referring to it. If the tariff governs tariffs issued jointly by two or more agents, it shall be ajoin issue (see § 1312.11).

49 C.F.R. § 1312.25(d) *Cancellation of participating carriers.* (1) Except as provided in paragraph (f) of this section, when a carrier's participation in a participating carrier tariff or governed tariff is canceled, **all reference to the carrier in the involved tariff(s) shall be canceled**.

(2) The cancellation may be accomplished either by –

(i) Amending all matter to eliminate reference to the carrier; or

(ii) Publishing a blanket cancellation notice.

The blanket cancellation shall be published in the participating carrier tariff and shall be referred to in the cancellation of the carrier's name. A provision referring to the canceled carrier may not be republished without concurrent cancellation of the reference to that carrier and all matter shall be amended as soon as possible.

(3)(i) In a bound tariff the canceled carrier's name (and reference to the blanket cancellation notice, if used) shall be carried forward as reissued matter in the list of participating carriers.

(ii) In a looseleaf tariff, the carrier's name (and reference to the blanket cancellation notice, if used) and

the date the cancellation became effective shall be republished in successive issues of the list of participating carriers until all provision referring to the carrier are amended. (emphasis added)

49 C.F.R. § 1312.27(e): *Participation in governing publications.* Carriers participating in tariffs which refer to, and are governed by, separate tariffs (classifications, exceptions, rules etc.) **shall also participate in those governing separate tariffs,** unless specifically stated in the governed tariffs that provisions in the separate tariffs will not apply for their account. (emphasis added)

49 C.F.R. § 1312.30(b): *Method of Showing Distances.* Distance rates may be published to apply per vehicle per mile, or other unit per mile, or by establishing a rate table or segment showing a **scale of distances** for which charges will be applied. If the latter method is used, a rate shall be provided for each distance. Each State or area covered by the application of the rates shall be listed. The listing may be brief but informative as to the territorial coverage. (emphasis added)

49 C.F.R. § 1312.30(c): *Determination of distances.* (1) A tariff containing distance rates **shall contain provisions for the determination of distances by –**

(i) Publishing the distances between all locations covered by the distance rates in the tariff;

(ii) Referring to a map(s) attached to the tariff; or

(iii) **Referring to a distance guide(s).** (emphasis added)

49 C.F.R. § 1312.30(c)(4): Except as provided in § 1312.13(e)(2), **only distance guides officially on file**

with the Commission may be referred to. More than one may be referred to provided the rate tariff clearly specifies the circumstances under which each guide will apply. An agent's tariff may refer to another agent's distance guide. (emphasis added)

No. 93-284

In The

Supreme Court of the United States

October Term, 1993

SECURITY SERVICES, INC.,

Petitioner,

v.

K MART CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S SUPPLEMENTAL REPLY IN OPPOSITION

WILLIAM J. AUGELLO
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October 4, 1993

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For The Third Circuit

RESPONDENT'S SUPPLEMENTAL REPLY IN OPPOSITION

Since the filing of K Mart's Reply in Opposition to Security Services' Petition For Writ of Certiorari, this Court has denied a Petition for Certiorari in *F.P. Corp. v. Twin_Modal, Inc.*, 989 F.2d 285 (8th Cir. 1993), *cert. denied*, No. 92-2062 (Oct. 4, 1993). That decision arrived at the same result as the instant case (i.e., a non-participating carrier's use of the Household Goods Carriers Bureau Mileage Guide Tariff to compute undercharges violates the filed rate doctrine).

A different result was reached by the D.C. Circuit and the Seventh Circuit Courts of Appeals in *Overland Express, Inc. v. Interstate Commerce Commission*, 996 F.2d

356 (D.C. Cir. 1993), *reh'g denied*, (D.C. Cir. Sept. 22, 1993), *rev'g sub nom., Jasper Wyman & Son, et al. – Petition for Declaratory Order – Certain Rates and Practices of Overland Express, Inc.*, No. 40510, 8 I.C.C.2d 245 (1992) (See **Appendix A** for order denying rehearing); *Brizendine v. Cotter & Co.*, ___ F.2d ___, 1993 WL 292348 (7th Cir. 1993), *reh'g denied*, (7th Cir. Sept. 21, 1993) (See **Appendix B** for order denying rehearing). Petitions for *certiorari* will be filed in the latter cases. See **Appendix C** (Press Release from Interstate Commerce Commission in *Overland Express*).

In light of multiplicity of appeals on the identical issue, Respondent suggests that this Court grant *certiorari* only in *Overland Express*, since it is the first case in which a Circuit Court of Appeals disagreed with the majority view and overturned the I.C.C. decision upon which all of the previous cases were founded. (*Jasper Wyman & Son, et al.*) All other petitions for *certiorari* should be stayed pending this Court's disposition of *Overland Express*, and should be consolidated if *certiorari* is granted. See **Appendix D** listing cases before this Court and the Circuit Courts of Appeals involving the Household Goods Carrier Mileage Guide Tariff issue.

Respectfully submitted,

WILLIAM J. AUGELLO

October 4, 1993

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-1037 **September Term, 1992**

Overland Express, Inc.,

Petitioner

v.

Interstate Commerce Commission,

Respondent

BEFORE: Edwards and Silberman, Circuit Judges

ORDER

(Filed Sept. 22, 1993)

Upon consideration of respondents' petition for rehearing, filed August 6, 1993, and of the responses thereto, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-1037 September Term, 1992

Overland Express, Inc.,

Petitioner

v.

Interstate Commerce Commission,

Respondent

BEFORE: Mikva, Chief Judge; Wald, Edwards, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges

ORDER

(Filed Sept. 22, 1993)

Respondents' Suggestion For Rehearing *En Banc* and the responses thereto have been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-1037 September Term, 1992

Overland Express, Inc.,

Petitioner

v.

Interstate Commerce Commission,

Respondent

BEFORE: Mikva, Chief Judge; Wald, Edwards, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges

ORDER

(Filed Sept. 22, 1993)

Upon consideration of Amici Curiae's Petition for Waiver of Local Rule 15(a)(7), it is

ORDERED, by the Court, *en banc*, that the petition is granted and the Clerk is directed to file the lodged response of amici curiae.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 21, 1993

HON. JOEL M. FLAUM, Circuit Judge

HON. DANIEL A. MANION, Circuit Judge

HON. ILANA D. ROVNER, Circuit Judge

ROBERT E. BRIZENDINE, Trustee on behalf of the Bankruptcy Estate of Brown Transport Truckload, Inc., Brown Transport Corp., and Thurston Motor Lines, Inc. Plaintiff-Appellant.	]	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
v.	]	No. 91 C 6761
No. 92-2925	]	Milton I. Shadur, Judge.
COTTER & COMPANY, Defendant-Appellee.	]	

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause on August 30, 1993, by defendant-appellee, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

APPENDIX C

INTERSTATE COMMERCE COMMISSION
ICC NEWS
12th & Constitution Avenue N.W. ❑ Washington D.C. 20423

FOR RELEASE
Tuesday, September 28, 1993
No. 93-257

Contact: Dennis Watson
(202) 927-5350
TDD (202) 927-5721

ICC TO SEEK SUPREME COURT REVIEW IN *OVERLAND* CASE OF EFFECT OF AGENCY'S "VOID-FOR-NONPARTICIPATION" TARIFF RULE

Interstate Commerce Commission Chairman Gail C. McDonald announced today that the Commission has unanimously decided to file a petition for writ of *certiorari* seeking Supreme Court review of *Overland Express, Inc. v. ICC*, 996 F.2d 356 (D.C. Cir. 1993), *reh'g denied* (Sept. 22, 1993) and to ask the Solicitor General to join with the Commission in filing the petition. In *Overland* the court ruled that the Commission exceeded its statutory authority to retroactively reject a tariff the Commission had accepted for filing in finding that the effect of a pre-existing Commission tariff rule rendered Overland's mileage rates void as a matter of law and, hence, not usable as a basis for attempts to collect undercharges. Overland had failed to participate in the agency tariff upon which it purported to rely for the distance portion of its mileage rates.

Two other appellate courts have sided with the D.C. Circuit in declining to give effect to the "void-for-nonparticipation" tariff rule. See *Robert E. Brizendine, Trustee on Behalf of the Bankruptcy Estate of Brown Transport Truckload,*

Inc., Brown Transport Corp., and Thurston Motor Lines, Inc. v. Cotter & Company, No. 92-2925 (7th Cir. Aug. 5, 1993) and *Security Services, Inc. f/k/a Riss International Corp. v. P-Y Transportation, Inc. f/k/a C.T.S. Brokerage, Inc.*, No. 92-3992 (6th Cir. Aug. 30, 1993). Three appellate courts have affirmed application of the Commission's tariff rule. See *Freightcor Services, Inc. v. Vitro Packaging, Inc.*, 969 F.2d 1563 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 979 (1993); *F.P. Corp. v. Twin Modal, Inc.*, 989 F.2d 285 (8th Cir. 1993); and *Security Services, Inc. v. K Mart Corp.*, 996 F.2d 1516 (3d Cir. 1993). Petitions for writ of *certiorari* are already pending in the latter two cases.

The Commission decision under review in the *Overland* case is *Jasper Wyman & Son et al. – Pet. for Declaratory Order*, 8 I.C.C.2d 246 (1992).

APPENDIX D

LIST OF CASES INVOLVING HOUSEHOLD GOODS CARRIER BUREAU MILEAGE GUIDE TARIFF ISSUE

CASES UPHOLDING THE I.C.C.'S REGULATIONS WHERE A PETITION FOR CERTIORARI FILED

Freightcor Services, Inc. v. Vitro Packaging, Inc., 969 F.2d 1563 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 979 (Jan. 11, 1993)

F.P. Corp. v. Twin Modal, Inc., 989 F.2d 285 (8th Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 5 d67 (U.S. July 24, 1993), *cert. denied*, (U.S. Oct. 4, 1993) (No. 92-2062)

Security Services, Inc. v. K Mart Corporation, 996 F.2d 1516 (3rd Cir. 1993), *petition for cert. docketed*, No. 93-284

CASES REJECTING THE I.C.C.'S REGULATIONS WHERE A PETITION FOR CERTIORARI IS EXPECTED TO BE FILED

Brizendine v. Cotter & Co., ___ F.2d ___, 1993 WL 292348 (7th Cir. 1993), *reh'g denied* (7th Cir. Sept. 21, 1993)

Overland Express, Inc. v. Interstate Commerce Commission, 996 F.2d 356 (D.C. Cir. 1993), *reh'g denied* (D.C. Cir. Sept. 22, 1993)

CASES PENDING BEFORE THE CIRCUIT COURTS OF APPEALS

First Circuit

Growe v. Malden Mills Industries, et al., 821 F. Supp. 32 (D. Me. 1993), *appeal docketed*, No. 93-1556 (1st Cir.)

Third Circuit

Country Wide Truck Service, Inc. v. Wetherill Associates, Inc., Civ. No. 93-359, 1993 WL 210555 (E.D. Pa., June 3, 1993), *appeal docketed*, No. 93-1593 (3rd Cir.) {Unreported}

Fourth Circuit

F.P. Corp. v. Golden West Foods, Inc., 807 F. Supp. 1228 (W.D. Va. July 28, 1992), *appeal docketed*, No. 92-2000(L) (4th Cir.)

Sixth Circuit

Security Services, Inc. v. Dubois Chemical, Inc., 817 F. Supp. 677 (S.D. Ohio, Mar. 19, 1993) (*appeal filed*)

Security Services, Inc. f/k/a Riss International Corp. v. P-Y Transportation, Inc., f/k/a C.T.S. Brokerage, Inc., ___ F.2d ___, 1993 WL 325719 (6th Cir. 1993), *pet. for reh'g filed*, No. 92-3992 (6th Cir. Sept. 10, 1993)

Seventh Circuit

Security Services, Inc. f/k/a Riss International Corp. v. Chemrex, Inc., No. 92 C 4214, 1993 WL 189865, 1993 Fed. Carr. Cas. (CCH) ¶ 83,849 (N.D. Ill. June 2, 1993), *appeal docketed*, No. 93-2632 (7th Cir.) {Unreported}

Ninth Circuit

In re: Columbia Navigation, Inc. v. Teton West Lumber Sales, 1992 Fed. Carr. Cas. (CCH) ¶ 83,785 No. 89-30176-JLP (D. Mont. July 28, 1992), *appeal filed*, No. 92-36680 (9th Cir.)

Convaire International, Inc. v. NTI, Inc., CV 92-1283-PA (D. Ore., Apr. 6, 1993) (*appeal filed*)

Security Services, Inc. v. All Freight Services, Inc., 1992 Fed. Carr. Cas. (CCH) ¶ 83,788 (S.D. Cal. May 4, 1992), *appeal filed*, No. 92-55785 (9th Cir.)

Eleventh Circuit

Pope v. Amoco Fabrics & Fibers Co., 1992 Fed. Carr. Cas. (CCH) ¶ 37,960 (N.D. Ala. 1992), *appeal docketed*, No. 92-6877 (11th Cir.)

Brizendine v. Kumho, U.S.A., Inc., 1992 Fed. Carr. Cas. (CCH) ¶ 83,779 (Bankr. N.D. Ga. July 1, 1992), *rev'd*, Civ. No. 1:92-CV-2193-GET (N.D. Ga., Sept. 8, 1993) (*appeal filed*)

No. 93-284

In The

Supreme Court of the United States

October Term, 1993

SECURITY SERVICES, INC.,

Petitioner,

v.

K MART CORPORATION,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The Third Circuit

JOINT APPENDIX

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Petition for Writ of Certiorari Filed August 23, 1993
Writ of Certiorari Granted October 18, 1993

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TABLE OF CONTENTS

RELEVANT DOCKET ENTRIES

APPEAL

U.S. District Court
U.S. District Court Of
Eastern Pennsylvania (Philadelphia)

CIVIL DOCKET FOR CASE #: 91-CV-6782

Filed: 10/30/91

SECURITY SERVICES v. K MART CORPORATION
Assigned to: JUDGE DONALD W. VANARTSDALEN
Demand: $465,000
Lead Docket: None
Dkt# in other court: None
Jury demand: Defendant
Nature of Suit: 450
Jurisdiction: Federal Question

Cause: 28:1331 Fed. Question: Interstate Commerce Act

SECURITY SERVICES, INC. f/k/a RISS INTERNATIONAL CORPORATION PLAINTIFF	HARVEY S. LUTERMAN [COR LD NTC] LAW OFFICES OF HARVEY S. LUTERMAN 30 SOUTH 15TH STREET GRAHAM BLDG. 12TH FL. PHILA, PA 19102-1719 USA PAUL O. TAYLOR [COR LD NTC] HARRIS AND TAYLOR 2950 METRO DRIVE SUITE 301 BLOOMINGTON, MN 55425 USA

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HARRIS & TAYLOR
2950 METRO DRIVE
BLOOMINGTON, MN
55425
USA

v.

K MART
CORPORATION
DEFENDANT

CHARLES L. HOWARD
[COR LD NTC]
HOYLE, MORRIS & KERR
1650 MARKET STREET
ONE LIBERTY PLACE
STE. 4900
PHILA, PA 19103
USA

Proceedings include all events.
2:91cv6782 SECURITY SERVICES v. K MART CORPORATION APPEAL

10/30/91	1	Complaint. filing fee $ 120 (sb) [Entry date 10/31/91]
10/30/91	–	Summons(es) issued, mailed to: Counsel 10/31/91 (sb) [Entry date 10/31/91]
10/31/91	–	Filing Fee Paid; filing fee $ 120.00 receipt #355607 (ag

12/5/91	2	Summons returned with affidavit of Mark Lees re: service executed as to DEFENDANT K MART CORPORATION on 11/27/91 by handing copies to Tom O'Brien. (ag) [Entry date 12/06/91]
12/10/91	3	STIPULATION AND ORDER THAT DEFENDANT SHALL BE GRANTED AN EXTENSION OF TIME IN WHICH TO ANSWER, RESPOND OR OTHERWISE PLEAD TO PLAINTIFF'S COMPLAINT UNTIL DECEMBER 20, 1991. (SIGNED BY JUDGE DONALD W. VAN-ARTSDALEN) 12/11/91 ENTERED AND COPIES MAILED. (ag) [Entry date 12/11/91]
12/20/91	4	Answer to Complaint by DEFENDANT K MART CORPORATION, certificate of service; jury demand (ag) [Entry date 12/23/91]
12/20/91	–	ISSUE JOINED. (ag) [Entry date 12/23/91]
1/10/92	–	Pre-trial conference SET at 9:00 1/29/92 (mc)
1/14/92	5	Reply by PLAINTIFF SECURITY SERVICES, INC., certificate of service. (ag)
2/12/92	6	Report of Pretrial Conference of 2/12/92. (ms)
8/20/92	7	MOTION BY DEFENDANT K MART CORPORATION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE FOR STAY AND REFERRAL TO THE INTERSTATE COMMERCE COMMISSION, BRIEF, EXHIBITS, CERTIFICATE OF SERVICE. (ks) [Entry date 08/21/92]

8/26/92	8	Brief by PLAINTIFF SECURITY SERVICES in opposition to DEFENDANT'S [7-1] MOTION FOR SUMMARY JUDGMENT, certificate of service. (ks)
9/3/92	9	Memorandum of Supplemental Authority by DEFENDANT K MART CORPORATION in support of [7-1] MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, FOR STAY AND REFERRAL TO THE INTERSTATE COMMERCE COMMISSION. (ks) [Entry date 09/04/92]
9/4/92	10	Memorandum of Supplemental Authority by DEFENDANT K MART CORPORATION in support of [7-1] MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, [7-2] MOTION FOR STAY AND REFERRAL TO THE INTERSTATE COMMERCE COMMISSION, certificate of service. (ks) [Entry date 09/08/92]
9/8/92	11	Rebuttal by DEFENDANT K MART CORPORATION to Plaintiff's Brief opposing MOTION TO DISMISS OR [7-1] MOTION FOR SUMMARY JUDGMENT, Certificate of Service. (hb) [Entry date 09/09/92]
9/9/92	12	Minute entry date 9/9/92 re: Hearing regarding defendant's Motion for Summary Judgment, etc.; Judgment entered in favor of defendant and against plaintiff. (ks) [Entry date 09/10/92]
9/9/92	13	ORDER THAT HARVEY S. LUTERMAN'S MOTION FOR ADMISSION OF PAUL TAYLOR, ALAN D. HARRIS AND DAVID P. CHAMELI PRO HAC VICE IS GRANTED; PAUL O. TAYLOR, ALAN D. HARRIS AND DAVID P. CHAMELI ARE ADMITTED PRO HAC VICE FOR PLAINTIFF RISS INTERNATIONAL CORP. (SIGNED BY JUDGE DONALD W. VANARTSDALEN) 9/10/92 ENTERED AND COPIES MAILED. (ks) [Entry date 09/10/92]

9/9/92	14	ORDER GRANTING DEFENDANT'S [7-1] MOTION FOR SUMMARY JUDGMENT; JUDGMENT IS ENTERED IN FAVOR OF DEFENDANT K-MART AND AGAINST PLAINTIFF SECURITY SERVICES, INC. f/k/a RISS INTERNATIONAL CORPORATION ON ALL PLAINTIFF'S CLAIMS SET FORTH IN COMPLAINT. (SIGNED BY JUDGE DONALD W. VANARTSDALEN) 9/10/92 ENTERED AND COPIES MAILED. (ks) [Entry date 09/10/92]
9/9/92	–	Case closed (kv) [Entry date 09/11/92]
9/10/92	15	MOTION BY PLAINTIFF SECURITY SERVICES FOR PAUL O. TAYLOR, ALAN D. HARRIS AND DAVID P. CHAMELI TO APPEAR PRO HAC VICE CERTIFICATE OF SERVICE. (ks) [Entry date 09/11/92]
10/5/92	16	Notice of appeal by PLAINTIFF SECURITY SERVICES. Fee Status: paid, Copies to JUDGE DONALD W. VANARTSDALEN, Clerk USCA, Appeals Clerk, and CHARLES L. HOWARD, DAVID P. CHAMELI, PAUL O. TAYLOR, ALAN D. HARRIS, HARVEY S. LUTERMAN, certificate of service. (ks) [Entry date 10/06/92]

10/5/92	17	Copy of Clerk's notice to USCA re: [16-1] appeal. (ks) [Entry date 10/06/92]
10/8/92	–	Notice of Docketing ROA from USCA Re: [16-1] appeal. USCA NUMBER: 92-1833 on 10/8/92. (ks) [Entry date 10/09/92] [Edit date 10/21/92]
10/21/92	18	Transcript dated 9/9/92 re: Bench Opinion. (ks)
10/22/92	19	Copy of TPO form re: [16-1] appeal (ks) [Entry date 10/23/92]
10/29/92	–	RECORD COMPLETE FOR PURPOSES OF APPEAL (cc)

GENERAL DOCKET FOR
Third Circuit Court of Appeals

Court of Appeals Docket #: 92-1833 Filed: 10/8/92
Nsuit: 3450 Commerce ICC Rates
Security Serv. Inc. v. K Mart Corp
Appeal from: Eastern District of Pennsylvania

Lower court information:

District: 0313-2 : 91-06782
Trial Judge: Donald W. VanArtsdalen, District Judge
Court Reporter: Michael Hearn
Date File: 10/30/91
Date order/judgment: 9/10/92
Date NOA filed: 10/5/92

Fee Status: paid

Prior cases:
None
Current cases:
None

Proceedings include all events.
92-1833 Security Serv Inc v. K Mart Corp

SECURITY SER INC, f/k/a RISS INTERNATIONAL CORPORATION Appellant	Paul O. Taylor 612-854-3996 [COR NTC ret] Harris & Taylor 2950 Metro Drive Suite 301 Bloomington, MN 55425
v. K MART CORP Appellee	Charles L. Howard 215-981-5700 [COR NTC ret] Hoyle, Morris & Kerr 1650 Market Street 4900 One Liberty Place Philadelphia, PA 19103

10/8/92 CIVIL CASE DOCKETED. Notice filed by Security Services, Inc., f/k/a/ Riss International Corporation. (ghb)

10/15/92 APPEARANCE from Attorney Charles L. Howard on behalf of Appellee K Mart Corp, filed (dlr)

10/15/92 DISCLOSURE STATEMENT on behalf of Appellee K Mart Corp, filed. (dlr)

10/16/92 TRANSCRIPT PURCHASE ORDER (part I), ordering a transcript of the proceedings, filed. (sdt)

10/16/92 APPEARANCE from Attorney Paul O. Taylor on behalf of Appellant Security Serv Inc, filed. (dlr)

10/16/92 INFORMATION STATEMENT on behalf of Appellant Security Serv Inc, received. (dlr)

10/23/92 TRANSCRIPT PURCHASE ORDER (Part III) notifying transcript, ordered on 10/14/92 filed in D.C. by Michael Hearn, filed. (sdt)

10/26/92 FOLLOW UP LETTER to Alan D. Harris requesting the following documents: ** Disclosure Statement (ghb)

10/26/92 DISCLOSURE STATEMENT on behalf of Appellant Security Services, Inc., f/k/a/ Riss International Corporation, filed. (ghb)

10/30/92 CERTIFIED LIST filed. (ghb)

10/30/92 BRIEFING NOTICE ISSUED. Appellant brief and appendix due 12/9/92. (ghb)

12/8/92 BRIEF on behalf of Appellant Security Serv Inc, Pages: 36, Copies: 10, Delivered by mail, filed. Certificate of service date 12/8/92. (cpm)

12/8/92 APPENDIX on behalf of Appellant Security Serv Inc Copies: 4 Volumes: 1, Delivered by mail, filed. Certificate of service date 12/8/92. (cpm)

1/7/93 BRIEF on behalf of Appellee K Mart Corp pages: 30, Copies: 10, Delivered by mail, filed. Certificate of Service date 1/7/93. (jlb)

1/22/93 LETTER dated 1/22/92 received pursuant to Rule 28 (j) from counsel for Appellee. **SEND TO MERITS PANEL.** (awi)

3/1/93 CALENDARED for Tuesday, May 4, 1993. (wab)

3/23/93 Letter dated March 22, 1993 from Charles L. Howard, Esquire, counsel for appellee, advising the Court that he will be unavailable on Thursday, May 6, 1993. (pl)

4/26/93 LETTER dated 4/26/93 received pursuant to Rule 28(j) from counsel for Appellee. (awi)

5/4/93 SUBMITTED 5/4/93 Coram: Cowen, Roth & Rosenn, Circuit Judges. (agb)

5/26/93 MOTION filed by Appellee India Teximpor in 92-5596 and Appellee Garvey Group in 92-5629 for consolidation of appeal Nos. 92-5596, 92-5629, 92-1833 and 93-3059 for disposition. Certificate of Service dated 5/22/93/(ma)

5/26/93 ORDER (Clerk) denying motion by Appellee India Teximpor in 92-5596 and Appellee Garvey Group in 92-5629 for consolidation of appeal Nos. 92-5596, 92-5629, 92-1833 and 93-3059 as untimely insofar as the cases have previously been assigned to panels for disposition. Copies of the motion will, however, be sent to the panels for their information, filed. (ma)

6/18/93 OPINION (Cowen, Roth, Rosenn, Authoring Judge, Circuit Judges), filed. (bj)

6/18/93 JUDGMENT: AFFIRMED. Costs taxed against appellant, filed. (bj)

7/12/93 MANDATE ISSUED, filed. (bj)

7/12/93 RECORD released. (bj)

8/30/93 Supreme Court of U.S. notice filed advising petition for writ of certiorari filed by Appellant Security Ser Inc. Filed in the Supreme Court on 8/23/93 at Supreme Ct. case number: 93-284. (ch)

9/8/93 REPORTER at 996 F2d: 1516 (kot)

10/27/93 U.S. Supreme Court order dated 10/18/93 at S.C. number: 93-284, granting petition for writ of certiorari by Appellant Security Ser Inc. filed. (bj)

10/28/93 Letter dated Oct. 21, 1993 from Sandy Nelsen, Asst. Clerk United States Supreme Ct., requesting that we certify & transmit the complete record to them, in light of certiorari having been granted on Oct. 18, 1993, in this appeal rec'd. (bj)

Supplement Nos. 1, 3, 5, 8, 11, 13 and 17
Contain All Changes

FEB 8 1985

SUPPLEMENT NO. 17
to
ICC HGB 101-B
Cancels
Supplement Nos. 14, 15 and 16

Household Goods Carriers' Bureau
Agent

SUPPLEMENT NO. 17
to

TARIFF NO. 101-B

APPLICABLE ONLY IN CONNECTION
WITH TARIFFS MAKING SPECIFIC REFERENCE
HERETO BY ICC DESIGNATION

PARTICIPATING CARRIER
AND SCOPE TARIFF

ISSUED: FEBRUARY 8, 1985
EFFECTIVE: FEBRUARY 19, 1985

(Except as otherwise provided for herein)

ISSUED BY: JOSEPH M. HARRISON, PRESIDENT, 3110 COLUMBIA PIKE, ARLINGTON, VA. 22204

PROVISIONS PUBLISHED HEREIN, IF EFFECTIVE, WILL NOT RESULT IN AN EFFECT ON THE QUALITY OF THE HUMAN ENVIRONMENT OR CONSERVATION OF ENERGY RESOURCES.

(NGD)

[Exhibit 1]

[Page 16]

SUPPLEMENT NO. 17 TO TARIFF ICC MGB 101-0

SECTION 2 – MILEAGE GUIDE PARTICIPANTS

	LIST OF PARTICIPATING CARRIERS	DOCKET NUMBER	P OF A NUMBER
≠	RAMSEY TOWING, H & M, Dennis Nasca, d/b/a, Blythe, CA	140600	[CM] #
@	RANDY'S TOURS, Estill More, d/b/a, Carrollton, KY	179430	[PA] 1
≠	RANSOM REFRIGERATED FREIGHTWAY, INC., Cranford, NJ	161840	[CM] #
≠	RAPISARDA/HINSON TRUCKING COMPANY, Chatsworth, CA	152760	[CT] #
≠	RAYBURN AND TUCKER TRUCK SERVICE, Blytheville, AR	162948	[CT] #
≠	RAY'S GARAGE, INC., Hales Corners, MI	112298	[CM] 1
@	REACH 49, INC., Portersville, PA	160256	[CM] 1
(X) (Z)	REBEL EXPRESS, INC., Perry, IA	148833	[CM] 2
@	RED STAR EXPRESS LINES, Auburn, NY	59135	[CM] 1
≠	RED TRAIL TRANSPORT, INC., Beach, ND	155136	[CM] #

	REDWING CARRIERS, INC., Tampa, FL	111045	[CM]	#
@	REED TRANSPORT, INC., T. G., Gunter, Grayson County, TX ...	180281	[CM]	1
≠	REESE TRUCKING, GARY, Gary A. Reese, d/b/a, Albert City, IA	147414	[CM]	#
@	REGIONAL EXPRESS COMPANY, Boise, ID ..	164484	[CM]	1
	REGIONAL TRANSPORTATION COMPANY, INC. Secaucos, NJ	146589	[CT]	#
	RESOURCE RECYCLING TECHNOLOGIES, INC., Portland, TN	161563	[CT]	#
≠	REVCO, INC., Amory, MS	157108	[CM]	#
≠	RIDDLE CARTAGE, INC., Gary, IN	119576	[CM]	#
≠	RIEMER, CLARENCE, Peshtigo, WI	141106	[CM]	#
	RISS INTERNATIONAL CORPORATION, Kansas City, MO	200	[CM]	#
≠	RIVER CITY TOURS, INC., El Dorado Hills, CA	155069	[PA]	#
≠	RIVER VALLEY OIL CO., Spring Green, WI	149234	[CM]	#
@	RIVERSIDE DISTRIBUTORS, INC., Chicago, IL	134292	[CM]	2
	ROBBINS TRUCKING, E. St. Louis, IL	170726	[CM]	#

@	ROBINSON TRUCKING CO., J.C. Robinson, d/b/a, Burnsville, NC	180488	[CM]	1
	ROBO, Robert H. Bolduc, d/b/a, Hudson, NH	160433	[CM]	#
	ROBO TRUCKING, INC., Hudson, NH	160433	[CM]	1
	ROCKY MOUTAIN EXPRESS, INC., San Francisco, CA	510	[FF]	#
≠	RODGERS BROTHERS EXPRESS, INCORPORAED, Patterson, NJ	106702	[CM]	#
≠	RODMAN ENTERPRISES, Justin Rodman, d/b/a, Paonia, CO	162300	[CT]	#
≠	ROGERS LEASIN, INCORPORATED, Scotch Plains, NJ	154657	[CM]	#
@	ROLFES CO. GEORGE A., Boone, IA	176030	[CM]	1
@	ROOSEVELT & SON, INC., M.W., Peltine Bridge, NY	179389	[CM]	1
≠	ROOT, INC., EDGAR W., Westfield, MA	75635	[CM]	#
≠	ROTA-CARRUS CORPORATION, Kansas City, KS	153837	[CT]	#
≠	ROUSE'S BODY SHOP, Spokane, WA	112570	[CM]	#
@	RUBRIGHT, INC., Harmony, PA	179700	[CM]	1

@	RUNGE TRUCKING, INC., St. James, MN ...	178686	[CM]	1
≠	RYAN TRUCKING CO., L. B., Lawrence B. Ryan, d/b/a, Crane, TX	162669	[CM]	#
	S AND B GREAT FREIGHT, INC., Rosemont, IL	159004	[CT]	?
≠	S & P PRODUCE, INC., Pompano Beach, FL	159223	[CM]	#
	S & P TRUCK LINES, Long Beach, CA	162298	[CM]	#
≠	S & W CARTAGE, INC., Warren, MI	157941	[CM]	#
	SDS TRANSPORT, INC., Quincy, MA	161950	[CM]	#
(MZ)	S I S TRUCKING, INC., West Chicago, IL	157597	[CM]	#
≠	S.R.I. TRUCKING CO., Carpinteria, CA	142811	[CT]	#
(X) (Z)	SALCO ENTERPRISES, Sally Wann and James Gaudina, d/b/a, Portland, OR	160506	[CM]	1
≠	SALO TRUCKING, LeRoy O. Salo, d/b/a, Gilbert, MN	147279	[CM]	?
	SALT CREEK FREIGHTWAYS, Casper, WY	59856	[CM]	#
≠	SANDI TRANSPORTATION, INC. Elizabeth, NJ	73612	[CM]	#
	SCARAB TRANSPORTATION, INC., Philadelphia, PA	159707	[CM]	#

@	SCARPACE CO., INC., L. J., Dearborn, MI	178419	[CM]	1
@	SCHNEIDER NATIONAL CARRIERS, INC., Green Bay, WI ...	133655	[CM]	1
@	SCHNEIDER NATIONAL FLEET SERVICE, INC., Green Bay, WI	151138	[CM]	1
@	SCHNEIDER NATIONAL TRANSCONTINENTAL, INC., Green Bay, WI ...	146131	[CM]	1
@	SCHNEIDER NATIONAL WEST, INC., Wilsonville, OR ..	141871	[CM]	1
≠	SCOTT TRUCKING COMPANY, Paul K. Scott, d/b/a, New Orleans, LA	159577	[CM]	#
≠	SEA-MAR SERVICES, INC., Pensacola, FL	154441	[CM]	1
@	SEKO AIR FREIGHT, Schiller Park, IL	734	[FF]	1
≠	SELLARS TRANSPORT SERVICE, INC., Eugene, OR	148083	[CM]	#
	SENATE CARTAGE COMPANY, INC., THE, Oak Brook, IL	151080	[CM]	#
≠	SENS TRANSPORT LTD., Regina, Saskatchewan, CN	162450	[CM]	#
@	SERVICE CARRIERS, INCORPORATED, Charlotte, NC	178306	[CM]	1

≠	SHALE AUTO TRANSPORT, INC., Hapeville, GA	41635	[CM]	#
≠	SHANNON MOTOR LINES, INC., Downey, GA	152361	[CM]	#
≠	SHEARON TRUCKING, John R. Shearon and Fred D. Shearon, d/b/a, Ashland City, TN	135452	[CT]	#
≠	SHERMAN, TOM, Clarence, IA	158434	[CT]	#
≠	SHERMER TRUCK LINES, C. L., Carl Shermer, d/b/a, Grove City, OH	152754	[CM]	#
≠	SHEYENE VALLEY LUMBER CO., Leonard, ND	151726	[CT]	#
≠	SHORE COMPANY, INC., Kilgore, TX	163578	[CM]	#
	SHORT LINE TRUCKING CO., INC., Louisville, KY	146256	[CM]	#
≠	SILCO PETROLEUM CARRIER, INCORPORATED, Jacksonville, FL	164450	[CM]	#
@	SILVERBIRD STAGES, The Show Production Company, d/b/a, Summerville, GA	174210	[PA]	1
≠	SIOUX TRANSPORTATION COMPANY, INC., Sioux City, IA	22301	[CM]	#

@	SIMBECK, INC., Winchester, VA	173661	[CM]	1
	SIMPSON TRUCKING, INC., Harrisburg, IL ...	142803	[CM]	#
@	SKILLER TRUCKING, R., Richard Skiller, d/b/a, Junction City, OR	174129	[CM]	1
≠	SKI'S TRANSFER, INC., Blaine, MN	163259	[CM]	#
@	SKI COUNTRY, INC., Bozeman, MT	179354	[CM]	1
@	SLUTZ TRUCKING CO., R.E., R.E. Slutz, d/b/a, North Industry, OH	178251	[CM]	1
≠	SMITH CARTAGE, John Howard Smith, d/b/a, Oak Lawn, IL	164056	[CT]	#
≠	SMITH CARTAGE, INC., P. M., Milwaukee, WI	162041	[CT]	#

ICC HGB 101-C
ICC HGB 207
4-19-87

ICC HGB 101-B
Cancels
ICC HGB 101-A

Household Goods Carriers' Bureau
Agent

TARIFF NO. 101-B

APPLICABLE ONLY IN CONNECTION
WITH TARIFFS MAKING SPECIFIC REFERENCE
HERETO BY ICC DESIGNATION

**PARTICIPATING CARRIER
AND SCOPE TARIFF**

ISSUED: JUNE 1, 1984 EFFECTIVE: JULY 1, 1984

ISSUED BY: JOSEPH M. HARRISON, PRESIDENT,
3110 COLUMBIA PIKE, ARLINGTON, VA 22204

PROVISIONS PUBLISHED HEREIN, IF EFFECTIVE, WILL NOT RESULT IN AN EFFECT ON THE QUALITY OF THE HUMAN ENVIRONMENT OR CONSERVATION OF ENERGY RESOURCES.

SEE PAGES 2 AND 3 FOR ABBREVIATIONS AND REFERENCE MARKS NOT EXPLAINED HEREIN.

[Page 2]

TABLE OF CONTENTS

EXPLANATION OF ABBREVIATIONS AND
REFERENCE MARKS
(For Standard Use Throughout This Tariff)

U.S. STATE ABBREVIATIONS

AL .....Alabama
AK .....Alaska
AZ .....Arizona

AR ..... Arkansas
CA ..... California
CO ..... Colorado
CT ..... Connecticut
DC ..... District of Columbia
DE ..... Delaware
FL ..... Florida
GA ..... Georgia
HI ..... Hawaii
ID ..... Idaho
IL ..... Illinois
IN ..... Indiana
IA ..... Iowa
KS ..... Kansas
KY ..... Kentucky
LA ..... Louisiana
ME ..... Maine
MD ..... Maryland
MA ..... Massachusetts
MI ..... Michigan
MN ..... Minnesota
MS ..... Mississippi
MO ..... Missouri
MT ..... Montana
NE ..... Nebraska
NV ..... Nevada
NH ..... New Hampshire
NJ ..... New Jersey
NM ..... New Mexico
NY ..... New York
NC ..... North Carolina
ND ..... North Dakota
OH ..... Ohio
OK ..... Oklahoma
OR ..... Oregon
PA ..... Pennsylvania
RI ..... Rhode Island

SC ..... South Carolina
SD ..... South Dakota
TN ..... Tennessee
TX ..... Texas
UT ..... Utah
VT ..... Vermont
VA ..... Virginia
WA ..... Washington
WV ..... West Virginia
WI ..... Wisconsin
WY ..... Wyoming

CANADIAN ABBREVIATIONS

Alta. ..... Alberta
B.C. ..... British Columbia
CN ..... Canada
Man. ..... Manitoba
N.B. ..... New Brunswick
Newf. ..... Newfoundland
N.S. ..... Nova Scotia
Ont. ..... Ontario
P.E.I. ..... Prince Edward Island
Que. ..... Quebec
Sask. ..... Saskatchewan

OTHER ABBREVIATIONS

d/b/a ..... Doing Business As
HGB ..... Household Goods Carriers' Bureau
ICC ..... Interstate Commerce Commission
MC ..... Motor Carrier
MF ..... Motor Freight
MP ..... Motor Passenger
Pts ..... Points
TA ..... Temporary Authority

REFERENCE MARKS

(+) – Denotes Addition.

– Cancel carrier's participation. For application of rates, rules or other tariff provisions, see tariffs lawfully on file.

▲ – Denotes change in wording the result of which is neither an increase not a reduction in charges.

* – Between or between points in.

(A) – (Reserved for future use)

(B) – Carrier participates ONLY in Tariff No. 405-A, ICC HGB 405-A, supplements thereto and reissues thereof.

(C) – Carrier participates ONLY in Tariff No. 404-A, ICC HGB 404-A, supplements thereto and reissues thereof.

(D) – Carrier participates ONLY in Tariff No. 402-A, ICC HGB 402-A, supplements thereto and reissues thereof.

(E) – Carrier participates ONLY in Tariff No. 400-C, ICC and governing Exceptions Tariff No. 104-A, ICC HGB 104-A, supplements thereto and reissued thereof.

(F) – (Reserved for future use)

ICC RISS 501-B
(For cancellation notice, see Page 2)
Original Title Page

THIS TARIFF APPLIES ONLY ON INTERSTATE AND FOREIGN COMMERCE

RISS INTERNATIONAL CORPORATION

MC-200

- - - - -

LOCAL MOTOR FREIGHT TARIFF NO. 501-B

Naming

CLASS RATES

(In cents per 100 pounds, except as otherwise noted)

AND

EXCEPTIONS TO THE NATIONAL MOTOR FREIGHT CLASSIFICATION

Applying On

COMMODITIES
(As provided for herein)

FROM, TO and BETWEEN

POINTS IN

THE UNITED STATES
(Except AK & HI)

Governed by rules and regulations and other provisions published herein. For reference to Governing Publications, see Item 100, Page 4.

ISSUED: August 20, 1984 EFFECTIVE: September 4, 1984.

The reissue of this tariff reflects an increase in rates.

Issued By

H. LYNN DAVIS, Vice-President Traffic & Commerce
P.O. Box 100
KANSAS CITY, MISSOURI 64141

The provisions published herein will, if effective, not result in an effect on the quality of the human environment.

Compiled by Western Traffic Services, Inc., 10412 Metcalf, Overland Park, KS 66212.

RISS INTERNATIONAL CORPORATION
Tariff No. 501-B

GOVERNING PUBLICATIONS

Publications ITEM

This tariff is governed, except as otherwise provided herein, by the following described publications, including supplements thereto and subsequent issues thereof:

AMERICAN TRUCKING ASSOCIATIONS, INC., AGENT:

Motor Carriers Explosives and dangerous Articles Tariff ATA 111-F, ICC ATA 111-F Series.

HOUSEHOLD GOODS CARRIERS' BUREAU, AGENT:

Mileage Guide No. 12, ICC HGB 100-A.

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., AGENT:

National Motor Freight Classification Tariff 100-K, ICC NMF 100-K. (See NOTE)

Operating Rights, Directory of, Tariff 105, ICC NMF 105 Series.

RISS INTERNATIONAL CORPORATION:

Rules and Regulations Tariff No. 100-A, ICC Riss 100-A.

NOTE – Application of all provisions of the NMFC to interstate shipments is as follows:

(A) Rules as provided in the NMFC:

1– Except as otherwise provided, where reference is made in the NMFC to 'less than

truckload' or 'LTL', such provisions apply to shipments consisting of any quantity of freight.

2– Except as otherwise provided, where reference is made in the NMFC to 'any quantity' or 'AQ', such provisions apply to shipments consisting of any quantity of freight.

3– Where reference is made in the NMFC to 'truckload' or 'TL', 'Vol.', or 'volume', such provisions apply to shipments wherein the quantity shipped meets, exceeds or is charged for at weights determined by the provisions of Item 997 of the NMFC using the MW factor in the NMFC for the commodity being shipped; or as may be specified in the rules of the NMFC.

(B) Commodities as described in the NMFC:

1– Except as otherwise provided herein, the class applicable to shipments of any quantity of freight is the class or classes in the column designated LTL for the commodity being shipped.

2– Where in the NMFC there is no class designated as provided for in (B) 1 above, but there are specific provisions of volume or truckload shipments, such provisions apply only as may be provided for in this tariff.

(C) Packaging specifications or shipping forms of commodities as provided in Items 110 through

201060 of the NMFC, packages 6 through 4000, packages 1F through 129F, and packages 3000S through 3008S:

1– Except as otherwise provided herein, packaging specifications or commodity shipping forms provided for individual commodities in connection with "LTL", "less than truckload", "AQ" or "Any Quantity provisions are applicable to all shipments of such commodities.

(Concluded on following page)

The provisions published herein will, if effective, not result in an effect on the quality of the human environment.

ISSUED: August 20, 1984

EFFECTIVE: September 4, 1984.

Issued By: H. LYNN DAVIS, Vice-President Traffic & Commerce, P.O. Box 100, Kansas City, MO 64141.

RATES ARE NOT SUBJECT TO SUPPLEMENT NO. 1.
ICC RISS 501-B 1ST. REV. PAGE 6

RISS INTERNATIONAL CORPORATION
Tariff No. 501-B
APPLICATION OF RATES

ITEM 161 ITEM 161

APPLICATION OF RATES (Applicable only where reference is made hereto) . . .

Where reference is made hereto, the charge will be as shown in Part A but, in no case less than the charge shown in Part B of this item.

PART A

When Applicable Rate Basis Number Is:	CHARGE Shall Be:
1 to 50	364.00
51 to 100	439.00
101 to 150	516.00
151 to 200	583.00
201 to 250	657.00
251 to 300	730.00
301 to 350	802.00
351 to 400	877.00
401 to 450	949.00
451 to 500	1021.00
501 to 550	1096.00
551 to 600	1169.00
601 to 650	1243.00
651 to 700	1315.00
701 to 750	1389.00

751 to 800	1463.00
801 to 850	1535.00
851 to 900	1609.00
901 to 950	1682.00
951 to 1000	1755.00
1001 to 1050	1828.00
1051 to 1100	1891.00
1101 to 1150	1975.00
1151 to 1200	2049.00
1201 to 1250	2121.00
1251 to 1300	2194.00
1301 to 1350	2268.00
1351 to 1400	2340.00
1401 to 1450	2413.00
1451 to 1500	2487.00
1501 to 1550	2561.00
1551 to 1600	2633.00
1601 to 1650	2707.00
1651 to 1700	2780.00
1701 to 1750	2853.00
1751 to 1800	2926.00
1801 to 1850	2999.00
1851 to 1900	3072.00
1901 to 1950	3146.00
1951 to 2000	3219.00
2001 to 2050	3292.00
2051 to 2100	3366.00
2101 to 2150	3438.00
2151 to 2200	3511.00
2201 to 2250	3585.00
2251 to 2300	3659.00
2301 to 2350	3732.00

2351 to 2400	3805.00
2401 to 2450	3878.00
2451 to 2500	3951.00
2501 to 2550	4024.00
2551 to 2600	4097.00
2601 to 2650	4172.00
2651 to 2700	4244.00
2701 to 2750	4317.00
2751 to 2800	4391.00
2801 to 2850	4464.00
2851 to 2900	4536.00
2901 to 2950	4610.00
2951 to 3000	4683.00
3001 to 3050	4756.00
3051 to 3100	4830.00
3101 to 3150	4903.00
3151 to 3200	4976.00
3201 to 3250	5049.00
3251 to 3300	5122.00
3301 to 3350	5195.00
3351 to 3400	5269.00
3401 to 3450	5342.00
3451 to 3500	5415.00

(Concluded on following page)

Issued: August 28, 1986 Effective: September 3, 1986
Issued By: Robert L. Burns, Traffic Manager,
P.O. Box 100, Kansas City, MO 64141

For explanation of abbreviations and
symbols. See page 3.

RISS INTERNATIONAL CORPORATION
Tariff No. 501-B

SECTION II

CLASS RATES

This Section contains Class Rates applying on interstate traffic between points, carrier is authorized to serve (See Item 100). Rates in this section will *not* apply where rates are provided in Section I of this tariff.

The Rate Base Number as used in this section is to be interpreted as meaning "Mile". Rate Base (mileage) will then be determined by use of the Mileage Guide No. 12, ICC HGB 100 Series, Household Goods Carriers' Bureau, Agent.

Except as otherwise provided, the Class Rates provided in this section are governed by ratings and minimum weights named in the National Motor Freight Classification No. 100 series and apply as follows:

When the charge computed on the higher rate at actual weight exceeds the charge computed on the lower rate, the latter charge will apply.

EXAMPLE: 480 pounds X $10.00 cwt = $48.00, and
500 pounds X $ 9.00 cwt = $45.00, therefor,

the latter charge is applicable.

Except as published the applicable NMFC class will be a true percentage (%) of the applicable class 100 published rate. Where the NMFC has a published class rating lower than class 50 and no rate is provided, use the next highest class rating shown.

Explanation of Lines of Rates – These Lines refer to weight: LT5 means less than 500 pounds; 500 means 500 pounds; and "M" as used after a number means thousand pounds:
EXAMPLE: 1M means 1,000 pounds.

MC – The letters "MC" refers to "Minimum charge". (See NOTE)

NOTE – Where the reference mark [*] is used on a weight line, rates in the referenced weight line may not produce charges less than the charges shown in Item 161 of this tariff.

The provisions published herein will, if effective, not result in an effect on the quality of the human environment.

ISSUED: August 20, 1984

EFFECTIVE: September 4, 1984.

Issued By: H. LYNN DAVIS, Vice-President Traffic & Commerce, P.O. Box 100, Kansas City, MO 64141.

PARTICIPATING CARRIERS

FOR A LIST OF PARTICIPATING CARRIERS REFER TO "PARTICIPATING CARRIER AND SCOPE TARIFF NO. 107-A," ICC HGB 107-A, HOUSEHOLD GOODS CARRIERS' BUREAU, AGENT, SUPPLEMENTS THERETO OR REISSUES THEREOF.

NOTE: THIS MILEAGE GUIDE MAY NOT BE EMPLOYED BY A CARRIER AS A GOVERNING PUBLICATION FOR THE PURPOSE OF DETERMINING TRANSPORTATION RATES BASED ON MILEAGE OR DISTANCE UNLESS CARRIER IS SHOWN AS A PARTICIPANT IN THE ABOVE NAMED TARIFF.

GENERAL PURPOSE OF THE MILEAGE GUIDE

The main objective of this Mileage Guide is to establish a uniform method of computing mileages. *Every reasonable scientific effort has been employed to develop accurate mileages between all points via principal highways suitable for truck travel.*

INTRODUCTION

Please read this section before beginning to use this Mileage Guide.

This Mileage Guide consists of two interdependent volumes – Volume 1 and Volume 2. Volume 1 contains the Governing Rules, the Key Point City Index and Mileage Charts for 1416 Key Point Cities. Volume 2 also contains the Governing Rules, the Key Point City Index, maps of the United States, Canada and Mexico, appropriate

Vicinity Maps and related highway and motor carrier information.

It is important to note that this Mileage Guide is the product of over fifty-three years of transportation experience plus thousands of hours of research and computer-enhanced development. As such, this publication represents our best effort at publishing an accurate and comprehensive governing Mileage Guide. However, the publisher cannot accept liability for any actual or consequential damage, loss, injury or delay incurred by any purchaser or user of the Guide resulting from their use of the information contained herein.

WEIGH STATIONS

The location of permanent weigh stations are shown on state and vicinity maps as a convenience to Guide users only and have no bearing on mileage computations. Weigh stations located in areas covered by vicinity maps are shown only on the vicinity maps and not on the state maps.

DIVISIONS OF THE MILEAGE GUIDE

1. The TRANSCONTINENTAL MAP (Volume 2, Pages 38-39) shows the principal arterial highway routes of the United States and Southern Canada and displays the Key Point cities (shown by green dots) between which specific chart mileages are listed in the mileage charts.

2. The KEY POINT CITY INDEX (Volumes 1 and 2, Pages 5-8) is a list of all 1416 Key Points. The list indicates the county in which the Key Point is located, the City's

population, its Standard Point Location Code (SPLC), the mileage chart page on which the city is the headline city and the State map page where the city is shown.

3. The MILEAGE CHARTS (Volume 1, Pages 9-719) are arranged by Key Point in alphabetical sequence and show specific chart mileages between 1415 Key Points. Key Point mileages are obtained by referencing the Key Point which is first in alphabetical arrangement of the two Key Points involved.

> To illustrate: Washington, D.C. to Cleveland, Ohio – Refer to Cleveland, Ohio, under which in alphabetical sequence is listed Washington, D.C. and the applicable mileage. It is important to understand and use this procedure because mileages * * *

4. The VICINITY MAPS (Volume 2, Pages 16-34) are detailed maps of selected areas (tinted green on the State and Canadian maps) showing highway distances between cities, towns, highway intersections and interchanges within such areas. To facilitate their use, principal highways have been overprinted with a pink band. This pink banding is intended as a visual aid only and does not preclude the use of other highways that may be authorized in accordance with any applicable rule in this Guide.

5. The STATE, CANADIAN and MEXICO MAPS (Volume 2, Pages 35-161) are detailed maps showing highway distances between cities, towns, highway intersections and interchanges. State and Canadian maps show areas (green tint) covered by the Vicinity maps.

6. INDEXES to counties, cities and towns are listed in convenient locations on each State and Canadian map. A black dot beside an entry indicates that that city is a Key Point. A list of all counties in the state or province is given. The county in which each city is located is also provided.

7. VICINITY MAPS INDEXES in counties cities and towns shown * * * .

No. 93-284

In The

Supreme Court of the United States

October Term, 1993

SECURITY SERVICES, INC.,

Petitioner,

v.

K MART CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR PETITIONER

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32 pp

QUESTION PRESENTED

Whether the Court of Appeals erred in concluding that the Interstate Commerce Commission has discretionary authority to retroactively void an effective tariff for noncompliance with ICC tariff publishing regulations?

PARTIES TO THE PROCEEDING

The parties to the proceeding are set forth in the caption on the cover to this brief.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania, issued on September 9, 1993, is not reported. It is reprinted in the Appendix to the Petition for Writ of Certiorari (hereinafter referred to as "Pet. App.") Pet. App. 1a.-16a.

The decision of the panel of the United States Court of Appeals for the Third Circuit, issued on June 18, 1993, is reported at 996 F.2d 1516 (3rd Cir. 1993). It is reprinted at Pet. App. 1b. to 24b.

JURISDICTION

The final judgment of the Court of Appeals was entered on June 18, 1993. Jurisdiction is proper pursuant to 28 U.S.C. § 1254(1), which provides for review by certiorari "upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." The petition for writ of certiorari was granted on October 18, 1993.

STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions:

49 U.S.C. § 10761. Transportation prohibited without tariff

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

49 U.S.C. § 10762. General tariff requirements

(a)(1) A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs

containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this chapter for transportation or service it may provide under this subtitle. A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs. A motor contract carrier that serves only one shipper and has provided continuous transportation to that shipper for at least one year or a motor carrier of property providing transportation under a certificate to which the provisions of section 10922(b)(4)(E) of this title apply or under a permit to which the provisions of section 10923(b)(5) of this title apply may file only its minimum rates unless the Commission finds that filing of actual rates is required in the public interest.

* * *

(e) The Commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section.

STATEMENT OF THE CASE

This case arises from a civil action filed by the Security Services, Inc., formerly known as Riss International, Inc. ("Riss"), pursuant to 49 U.S.C. §§ 10761(a) and 11706(a), to recover freight charges for interstate transportation services performed by Riss for K Mart Corporation ("K Mart"). The rates, charges, rules and regulations

governing transportation using Riss's services were maintained in published tariffs on file with the Interstate Commerce Commission ("ICC" or "Commission"). J.A. 23-34. As pertinent here Riss tariff 501-B contained distance rates based upon mileage applying on various commodities between points in the United States. J.A. 25. That tariff further provided that distances would be determined by another tariff published and filed with the ICC by the Household Goods Carriers Tariff Bureau as agent for Riss. J.A. 27. This incorporation by reference of the distance guide into the rate tariff was authorized by the ICC's tariff regulation. 49 C.F.R. § 1312.30. Although at one time Riss had provided a power of attorney to the Household Goods Bureau as required by 49 C.F.R. § 1312.4(d), the Bureau terminated Riss from its list of carriers participating in the distance guide effective February 8, 1985, before the shipments at issue in this case had taken place. J.A. 11, 14 and 24.

The district court granted summary judgment in favor of K Mart finding that the distance rates published by Riss in tariff 501-B were invalid because, although the rate tariff referred to the mileage guide tariffs, Riss had allowed its participation in the distance guide to lapse. Pet. App. 13a. In reaching this conclusion the district court relied, *inter alia*, upon the ICC's decision in *Jasper Wyman & Son – Petition for Declaratory Order Certain Rates and Practices of Overland Express, Inc.*, 8 I.C.C. 2d 246 (1992), *rev'd sub nom., Overland Express, Inc. v. ICC*, 996 F.2d 1516 (D.C. Cir. 1993). Pet. App. 10a. In that case the ICC ruled that because the carrier did not have an effective power of attorney or concurrence with the Household Goods Carriers' Bureau and its participation in the

Mileage Guide HGB 100 Series was cancelled, Overland's mileage rates were void or ineffective as a matter of law under 49 C.F.R. § 1312.4(d)[1] and could not form the basis for the collection of the published rates in its ICC filed common carrier tariff.

The Court of Appeals affirmed the district court's grant of summary judgment to K Mart. Relying upon the voiding language in 49 C.F.R. § 1312.4(d), the Court of Appeals concluded that Riss' filed rates were void as a matter of law due to Riss' nonparticipation in the distance guide at the time of the shipments at issue here. Pet. App. 15b. In reaching this conclusion the court found that the ICC's retroactive voiding power was embraced by the ICC's discretionary authority. Pet. App. 18b.

SUMMARY OF ARGUMENT

In *Interstate Commerce Commission v. American Trucking Associations, Inc.*, 467 U.S. 354 (1984) ("American Trucking"), the Court found that the ICC lacked explicit

[1] 49 C.F.R. § 1312.4(d) states as follows:

Concurrences and powers of attorney. Concurrences and powers of attorney shall not be filed with the Commission. However, a carrier may not participate in a tariff issued in the name of another carrier or an agent unless a power of attorney or concurrence has been executed. *Absent effective concurrences or powers of attorney, tariffs are void as a matter of law.* Should a challenge to a tariff be made on this basis, carriers will be required to submit the necessary proof. See also § 1312.10 (Emphasis added).

authority under the Interstate Commerce Act to retroactively reject an effective tariff. Specifically, the Court held that § 10762(e) did not give the ICC authority to retroactively reject effective tariffs. The Court found, nonetheless, that under the limited circumstances presented there, the ICC had discretionary authority to retroactively reject effective tariffs. This discretionary authority was limited to the situation presented there because the remedy furthered a specific statutory mandate of the Commission and the exercise of the rejection remedy was directly and closely tied to that mandate.

In applying the Court's decision in *American Trucking*, the Court of Appeals found that the language in 49 U.S.C. § 10762(a)(1) which authorizes the ICC "to prescribe other information that motor common carriers shall include in their tariffs" alone provided the requisite statutory mandate for the ICC to declare as void a tariff which violates ICC tariff publication rules. Pet. App. 19b. Such a result, of course, impermissibly attempts to apply § 10762 indirectly as a basis for retroactive rejection of tariffs in contravention of the Court's holding in *American Trucking* that that section of the Act did not grant the ICC such authority. Section 10762 sets forth detailed procedures for establishing and changing rates and provides that the ICC may reject a tariff if it violates that section or the regulations of the ICC carrying out that section. Clearly, however, the ICC cannot retroactively reject tariffs after such tariffs have been filed for violations of its publishing rules, for avoiding of tariffs would not further a specific statutory mandate of the Commission.

This court has previously held that an effective tariff may not be treated as nonexistent because it violates an

ICC publication regulation or even a substantive provision of the Act. Instead the carriers are strictly liable only for damages the shippers actually suffered. Yet the result that would be reached under the Court of Appeals' interpretation of the Commission's authority to promulgate rules relating to the publication of tariffs would reward shippers who have suffered no actual harm by allowing them to escape the application of filed tariffs and allow them to retain the benefit of a secret rate. The ICC's self-proclaimed power to declare effective tariffs void would not only impose extraordinary liability on carriers retroactively, but also completely undermine the Act's core purpose of public disclosure of common carrier rates.

ARGUMENT

A. THE COURT BELOW MISAPPLIED THIS COURT'S DECISION IN INTERSTATE COMMERCE COMMISSION V. AMERICAN TRUCKING ASSOCIATIONS, INC.

It is well-settled that a tariff, on file with the ICC, is not to be disregarded because of a defect in form, *Berwind-White Coal Mining Co. v. Chicago & E.R. Co.*, 235 U.S. 371, 375 (1914) or even if filed in violation of a substantive provision of the Interstate Commerce Act. *Davis v. Portland Seed Co.*, 264 U.S. 403, 425 (1924). The ICC also held this view until very recently. *Boren-Stewart Co. v. Atchison, T. & S.F. R. Co.*, 196 I.C.C. 120 (1933); *Acme Peat Products, Ltd. v. Acron, C. & Y. R. Co.*, 277 I.C.C. 641, 644 (1950). This court has never held that noncompliance with the ICC tariff publication rules results in the voiding of an effective tariff. In *American Trucking*, the Court

unanimously concluded that the ICC lacked explicit authority to reject an effective tariff. *American Trucking*, 467 U.S. at 355. A sharply divided Court, however, found that in the narrow circumstances presented there the ICC had discretionary authority to retroactively reject an effective tariff when a two part test is met: (1) the discretionary remedy must further a specific statutory mandate of the Commission, and (2) the exercise of the remedy must be directly and closely tied to that mandate. *Id.* at 367.

In 1980 Congress amended, to some extent, the Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.* (hereinafter "Act").[2] The amendments generally relaxed the prior strict entry requirements in an effort to promote more competitive and economical transportation services. One central feature of the Act was retained without change, however – the requirement that motor common carriers publish their rates, rules and classifications in tariffs, file those tariffs with the ICC and strictly adhere thereto. See 49 U.S.C. §§ 10761(a) & 10762(a).

One of the central requirements of the Interstate Commerce Act is that common carriers subject to ICC authority may provide regulated services only pursuant to tariffs filed with the Commission.[3] *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990). Carriers are specifically forbidden to provide such service in the absence of tariffs and "may not charge or receive a

[2] Pub. L. 96-296, July 1, 1980, 94 Stat. 793.

[3] 49 U.S.C. § 10761(a) (Supp. V, 1981). Hereafter, all references to sections are to the current version of the Interstate Commerce Act printed in Supp. V, unless otherwise indicated.

different compensation" than the rate specified in the filed tariff. Section 10761(a). By requiring filed tariffs and strict compliance with them, the Act seeks to avoid unjust discrimination and to give shippers an advance opportunity to challenge proposed rates. *Maislin*, 497 U.S. at 126. To achieve this protection for shippers, while taking account of the interests of carriers, the Act provides a carefully balanced set of explicit procedures, remedies and penalties.

Careful analysis of the decision below indicates that the Court of Appeals misapplied this Court's decision in *American Trucking, supra.*[4] The Court of Appeals incorrectly upheld the ICC's authority to issue the regulation at issue here that voids an effective tariff relying on that language in 49 U.S.C. § 10762(a)(1) permitting the ICC to prescribe information to be contained in tariffs. Pet. App. 19b.

Unlike the ICC in *Jasper-Wyman*, the court below correctly begins with the premise that its decision is governed by *American Trucking*. Under *American Trucking*

[4] The first portion of the Court of Appeals' decision dealt with whether the Mileage Guide was a tariff, whether the carrier was required to participate in the Mileage Guide and whether the carrier's mere reference to the Mileage Guide, rather than its participation therein, satisfied the ICC's regulations. Petitioner does not here contend that the Mileage Guide is not a tariff. Petitioner recognizes that under the ICC's view of its regulations carriers are required to participate in the Mileage Guide and that mere reference to the Mileage Guide as a governing tariff is not sufficient. Nevertheless, those issues are not here addressed because, on the most fundamental issue, it is urged that the ICC lacks authority to retroactively reject or nullify a filed tariff under the circumstances here.

the exercise of the retroactive rejection power must further a specific statutory mandate and the rejection power must be closely and directly tied to that mandate.[5] *American Trucking*, 467 U.S. at 367. The court below found that 49 U.S.C. § 10762(a)(1) of the Act provided the ICC with discretionary authority to retroactively reject the filed tariffs. Pet. App. 19b. However, 49 U.S.C. § 10762 simply cannot be used as a statutory mandate to declare effective tariffs retroactively void. The reason is simple: Congress established 49 U.S.C. § 10762(e) to govern *all* rejections of tariffs established under rules promulgated pursuant to § 10762. The language of § 10762(e) states:

> The Commission may reject a tariff submitted by a common carrier under *this* section if that carrier violates *this* section or regulation of the Commission carrying out *this* section. [Emphasis supplied].

Thus Congress clearly intended *any* regulation concerning the publication of tariffs promulgated pursuant to § 10762 to be governed only by subdivision (e) thereof. However, the sole appropriate statutory mandate which addresses the ICC's authority to reject tariffs tendered to

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[5] The U.S. Court of Appeals for the Eighth Circuit in *Atlantis Express, Inc. v. Associated Wholesale Grocers, Inc.*, 989 F.2d 281 (8th Cir. 1993) incorrectly stated its decision was not governed by *American Trucking*. This is a minority view as all other Courts of Appeals to address this question agree their decisions are governed by *American Trucking*. *See, Freightcor Services, Inc. v. Vitro Packaging, Inc.*, 969 F.2d 1563 (5th Cir. 1992), *cert denied*, 113 S. Ct. 979 (1993). *Brizendine v. Cotter & Co.*, 4 F.3d 457 (7th Cir. 1993). *Overland Express, Inc. v. Interstate Commerce Commission*, 996 F.2d 356 (D.C. Cir. 1993). *Security Services, Inc. v. P-Y Transp., Inc.*, 3 F.3d 966 (6th. Cir. 1993).

it for noncompliance with ICC tariff publishing publications is contained in 49 U.S.C. § 10762(e). This Court has previously held that this statute does not vest the ICC with authority to retroactively reject effective tariffs. *American Trucking, supra*, 467 U.S. at 363-364. Rather, this power is limited to rejection before the tariff becomes effective. The ICC's authority to reject effective tariffs must be based on its " . . . discretion to take actions that are 'legitimate, reasonable, and direct[ly] adjunct to the Commission's explicit statutory power'." *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 655 (1978) (quoting *United States v. Chesapeake & Ohio R. Co.*, 426 U.S. 500, 514 (1976)).

The Court below found that Riss' violations of the tariff publishing regulations were substantive. Pet. App. 22b. Until recently, however, even the Commission has acknowledged that § 10762(a) [formerly 49 U.S.C. § 217(a)] authorized the Commission to promulgate rules relating to form, not substance. *Shobe, Inc. v. Bowman Transportation, Inc.*, 350 I.C.C. 664, 670 (1975).

In *Shobe*, the Commission reviewed a decision wherein one of its Administrative Law Judges had awarded reparations to a shipper where the carrier had published its tariff in violation of ICC tariff publication regulations. The Commission reversed its Administrative Law Judge stating:

> The distinction made by the Administrative Law Judge between substantive and procedural rules prescribed by the Commission under § 217(a) is incorrect. The rules which the Commission is empowered to adopt relate to form, manner, and

> information, none of which is a substantive concept. . . . The remedy for a regulatory violation, rejection by the Commission, is exclusive, as is the penalty: the voiding of the tariff. [citations omitted].

350 I.C.C. at 670.

Thus, while the ICC has previously (and quite correctly) construed § 10762(a) as not providing a mandate to promulgate regulations of a nonsubstantive nature, the Court of Appeals apparently views § 10762(a) as authorizing the Commission to take the substantive action of retroactive voiding a tariff for violation of regulations governing "form, manner, and information". Clearly the Court of Appeals has misconstrued this Court's decision in *American Trucking*.

While the specific rationale of the Circuit Court should be rejected, the correct analysis, however, still lies with the Court's decision in *American Trucking, supra*. That decision holds that the ICC possesses discretionary remedial power not expressly delegated to it if it is closely and directly related to a specific statutory mandate and was designed to achieve objectives set for the Commission by Congress. *Id.*, 467 U.S. at 355-356. The question then is whether the remedial authority should be further extended to include an unlimited power to retroactively reject effective tariffs which violate an ICC tariff publication regulation promulgated pursuant to 49 U.S.C. § 10762(a).

While § 10762(a)(1) authorizes the ICC to prescribe "other information that motor common carriers shall include in their tariffs" this statutory provision is permissive only and does not command the Commission to do

anything. This is not a mandate at all. Rather it is a prescribed authorization to adopt regulations which the Commission has described as relating to "form, manner, and information, none of which is a substantive concept." *Shobe*, 350 I.C.C. at 670. The only "specific statutory mandate" relating to motor common carriers contained in § 10762(a)(1) is that which requires a motor common carrier to "publish and file with the Commission tariffs containing the rates for transportation it may provide. . . . " In analyzing whether the ICC has discretionary authority to retroactively reject a filed tariff, the Court found that "The question presented . . . is whether fashioning this remedy falls within the Commission's authority to modify express remedies to achieve legitimate statutory purposes." *American Trucking*, 467 U.S. at 367. The rate voiding power sanctioned by the Court of Appeals does not modify any express remedy granted to the ICC. Moreover, the net result of allowing a secret rate agreement to control interstate transportation transactions undermines, rather than achieves, a "legitimate statutory purpose" namely the central feature of the Act: the filed rate requirement. *Maislin, supra; Regular Common Carrier Conference v. United States*, 793 F.2d 376, 379 (D.C. Cir. 1986). ICC regulations should promote, not frustrate the Act's principal objective.

In *Overland Express, Inc. v. I.C.C.*, 996 F.2d 356 (D.C. Cir. 1993) the Court of Appeals for the District of Columbia Circuit reached the exact opposite result as the Court below in the matter at bar. In *Overland Express*, the Court of Appeals reviewed and set aside the ICC's decision in *Jasper Wyman, supra*, pursuant to the Hobbs Act. 28 U.S.C. §§ 2321 and 2342. Specifically the Court in *Overland*

Express found that the ICC's power to retroactively reject an effective tariff under its discretionary powers did not permit it to void the carrier's tariff merely because the carrier failed to provide a power of attorney to the publisher of the distance guide, stating:

> We rather doubt that [49 U.S.C.] § 10762(a)(1's) permissive authorization for the Commission to require carriers to include other unspecified information is the type of "specific statutory mandate" the court had in mind in *American Trucking*. And the Commission does not seem authorized to reject tariffs retroactively to satisfy a *regulatory* policy not driven by a specific statutory mandate.

Id. at 362 [emphasis supplied].

The decision in *Overland Express* specifically found that filed tariffs were effective and could not be declared void by the Commission because of a violation of tariff publishing regulations. 996 F.2d at 361. The reason stated by the court is that voiding a filed tariff undermines the core purpose of the Act which is to provide public disclosure of carrier rates so as to prevent rate discrimination by carriers. *Id.* at 361. Significantly the Court in Overland Express relied upon its previous holding in *Genstar Chemical Ltd. v. ICC*, 665 F.2d 1304 (D.C. Cir. 1981), *cert. denied*, 102 S. Ct. 1750 (1983).

In *Genstar*, a shipper argued that the collection of tariff rates should be precluded because of an alleged unlawfulness in the carrier's tariff which, although filed, did not comply with ICC regulations. *Id.*, at 1308. The shipper had asserted its right to the full refund of an illegal rate increase, "not from the establishment of

unlawful rates but from the unlawful publication of tariffs." *Id.* The shipper further maintained that unlawfully published tariffs could not serve to increase the transportation rate. The shipper objected to the publication because the carrier's increase exceeded previously approved levels and the updated tariffs did not "plainly state the changes proposed to be made in the schedules then in force as required by 49 U.S.C. § 6(3) (now revised as 49 U.S.C. § 10762)." *Id.* at 1308. The shipper also objected to the tariffs because they failed to "contain the appropriate symbols (required by agency regulation) or in any other way indicate the nature of the rate change." *Id.* at 1308. After reviewing these claims of tariff noncompliance the Court held:

> The Supreme Court long ago rejected the view that a tariff on file with the Commission and never rejected by it should be disregarded or treated as nonexistent merely because of some element of substantive unlawfulness in the rate [citation to *Davis* omitted], or some irregularity in the tariff filing formalities [citation to *Berwind* omitted]. The principle in these cases is that where the shipper has been charged no more than the rate reflected in the tariff on file, the remedy for unlawfulness or irregularity is measured not by looking to some other tariff but by the harm, if any, caused by the unlawfulness of irregularity.

Id. at 1308.

Here, the record establishes that the Riss rate tariff, including the provision incorporating the distance guide, and the distance guide itself were on file with the ICC and had not been rejected. J.A. 11-27. A tariff on file with

the Commission and not rejected is not to be disregarded or treated as nonexistent merely because of some element of substantive unlawfulness in the rate or some irregularity in tariff filing formalities. *Davis v. Portland Seed Co.*, 264 U.S. 404 (1924); *Berwind-White Coal Mining Co. v. Chicago & E.R. Co.*, 235 U.S. 371 (1914). Although recognizing the D.C. Circuit decision in *Genstar Chemical Ltd., supra*, among others, which held that tariffs were applicable regardless of technical deficiencies, the ICC nevertheless ruled in *Jasper Wyman & Son*, 8 I.C.C. 2d at 259, as follows:

> Here, however, Overland's tariff did not meet even the threshold requirement. Overland sent no distance tariff to the Commission itself, nor in lieu of that did it participate in the distance guides filed by another carrier or agent. Nor did the mileage guide list Overland as a participating carrier. Consequently, Overland's tariffs were not merely 'technically deficient', but, rather, lacked effective provisions necessary to calculate freight charges.

In *Overland Express*, the court recognized however that Overland's tariffs fit the characterization of a filed tariff set forth by the ICC in *Jasper Wyman* "to a tee". *Overland Express*, 996 F.2d at 361 n.5. Riss tariffs also fit that same description to a tee: they "could be considered on file because they at least met the threshold requirement (i.e. they had been sent to the Commission and had not been rejected at the outset)". 8 I.C.C. 2d at 259.

B. THE INTERSTATE COMMERCE ACT PRESCRIBES THE REMEDIES AVAILABLE TO K MART.

Congress, in regulating carriers, enacted a carefully integrated and complete system of procedures, remedies and penalties. This Court has repeatedly said that the statutory plan must be respected by the courts and the agencies alike, and has forbidden the use of implied or invented remedies which might disturb Congress' delicate balance between carrier and shipper interests. *See, e.g., Southern Ry. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 456-459 (1979). In this case, the Commission's claim of authority to reject effective tariffs is fundamentally at odds with the statute.

Chronologically, the first step in fixing a new rate, or changing an existing one, occurs when the carrier files with the Commission a new tariff, which may not take effect until a specified advance notice period has elapsed. Section 10762(a)(2). The same section that governs tariff filing provides that the Commission may (but is not required to) reject such a "tariff submitted to it by a common carrier" if the tariff "violates this section or regulation of the Commission carrying out this section." Section 10762(e). This tariff rejection authority is peremptory power on the part of the Commission to reject tariffs filed with it, before they become effective, when the Commission notices in the tariff a defect so patent as to make it pointless to consider the tariff under the Act's more detailed provisions. *American Trucking*, 467 U.S. at 362.

If the Commission accepts the tariff for filing, the next step under the statutory plan allows the Commission to suspend the effectiveness of the new tariff – before it becomes effective – for a period of up to seven months and to commence an investigation into its lawfulness. 49 U.S.C. § 10708(b). The suspension period is limited, however, to the time period prescribed by the statute after which the tariff goes into effect automatically if the Commission has not completed its inquiry. *Id.* At the end of the investigation, the Commission can also prescribe new rates for the future if the filed tariff is found to be unlawful. Section 10704(b)(1).

Finally, if the tariff is filed by the carrier and is neither rejected in advance (under section 10762(e)) nor subjected to suspension and investigation (under section 10708), it goes into effect. But the shipper may file at any time a court complaint for overcharges under 49 U.S.C. § 11706(b) or for damages under 49 U.S.C. § 11706(c)(2). In a suit for overcharges, the carrier may be held liable for "overcharge" liability if it has collected from the shipper more than the rate set forth in the published tariff. In a suit for damages, liability may be imposed under section 11705(b)(3) for "damages" if the carrier has collected the published tariff rate but that rate is unlawful under the substantive standards of the Act (e.g., because it is unreasonably high).[6]

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[6] In such a proceeding, the Commission may also use its prescription power and order adjustment in the tariff rate for the future, if the existing rate is found to be unlawful. See § 10704(b)(1).

The Act also includes an array of specific civil and criminal penalties designed to punish carriers for violations of the Act's provisions. Sections 11901, *et seq.* These penalty provisions include not only specific sanctions for such unlawful conduct as the payment of rate rebates (Sections 11902, 11904) and attempted evasion of regulation (Section 11906), but also general sanctions for willful violation of any provision of the Act or any Commission regulation or order.[7] As noted above, the Act provides that a tariff may go into effect only upon specific statutory notice. K Mart had the opportunity to petition the Commission before the tariff became effective to request the tariff be suspended and investigated pursuant to 49 U.S.C. § 10708. It failed to do so. Any time during the period the tariff was in effect it could have petitioned the Commission to set the tariff aside for the future pursuant to 49 U.S.C. § 10704(b)(1). It failed to do so.

With respect to tariffs which have gone into effect, the Act imposes on carriers two explicit forms of liability, damages liability, §§ 11705(b)(3) and 11706(c)(2) and overcharge liability, § 11706(b). Damages serve to make a shipper whole for any *actual injury* it has suffered. Here there has been no injury as the shipper is merely being asked to pay a tariff rate that has not been found by the Commission to be unreasonable.

The Motor Carrier Act provides specific, detailed procedures for challenging tariffs either upon submission, or after a filing. These specific and distinct remedies

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[7] See, e.g., § 11914(a) (fine prescribed for each day a rail carrier violation continues); § 11914(b) (fine prescribed for each day a motor carrier violation continues).

provide no authority for the Commission's claimed power to overturn filed tariffs which violate tariff publishing rules by treating them as retroactively void. Nothing suggests that Congress has intended to overturn this Court's established precedents or to permit rejection of common carrier tariffs after they had taken effect except within the limited circumstances outlined in *American Trucking*.

In sum, Congress has never given the ICC the broad nullification power set forth in 49 C.F.R. § 1312.4(d). Significantly, the Commission in § 1312.4(d) does not point to any specific statutory mandate which is furthered by its nullification rule. The remedies Congress has prescribed are specific. In *Consolidated Rail Corp. v. National Ass'n. of Recycling Industries*, 449 U.S. 609 (1981) the Court confirmed its long-held view that the Act's remedies are an integrated whole not lightly to be altered or enlarged by court or agency.

The strained distinctions by the Court of Appeals miss the critical fact: Riss' tariffs, including the provisions incorporating the distance guide, were filed. Adherence to filed tariffs is settled law. K Mart's remedies are those available to it under the Act; its remedy is not to retain the benefit of its secret rate. The effect of the Court of Appeals' decision is to suspend or ignore Riss' tariffs even without any prior action by the ICC addressing the lawfulness of the tariffs. This result is contrary to this Court's precedent.

In *Atchison, T. & S.F. Ry. Co. v. Wichita Board of Trade*, 93 S. Ct. 2367 (1972) the court reviewed the action of a trial court which had sought to enjoin new rates from

going into effect and had remanded the case to the ICC for a determination of the reasonableness of the tariff. The court found that it was error for the trial court to enter the injunction. *Id.* at 2380. The Court in *Wichita Board of Trade* also acknowledged the shipper's remedy:

> A shipper can challenge any such rate as unreasonable and, if he succeeds, may recover reparations. In addition, the Commission may prescribe a rate to be charged in the future.
>
> * * *
>
> For a period of up to seven months, the carriers may not collect the [rate] increase if the Commission suspends them. . . . If the increase is ultimately found unjustified, the Commission may order a refund. 49 U.S.C. § 15(7). Even if the Commission does not do so in a suspension proceeding, *the shippers may recover reparations* under some circumstances. [emphasis supplied]

Id. 412 U.S. at 812, 93 S. Ct. 2377.

Thus, this Court's precedent makes clear that K Mart's remedy was to seek suspension of the rates before they were effective, or to seek reparations thereafter. It has done neither.

In *Davis v. Portland Seed Co.*, 264 U.S. 404 (1924), a shipper contended that the tariff rate charged him – which admittedly was unlawful because it violated the Act's long-haul short-haul provision – should be treated as "non-existent" and that it should be allowed to recover on the basis of the lower rate charged favored shippers. The Court explicitly rejected the notion that a filed and effective tariff could be treated as "non-existent" (264 U.S. at 416, 422), holding that the shipper was entitled to

recover only any actual damages it had suffered (e.g. due to loss of business). See also *Texas & P. Ry. v. Cisco Oil Mill*, 204 U.S. 419 (1907) (filed and effective tariff could not be treated as a nullity because of alleged failure to comply with requirements that tariff be posted for public inspection).

This long-established principle that a filed and effective tariff may not be treated as a nullity contributes to the Act's goals of promoting certainty and protecting reliance on the filed tariff rates. Goods are shipped, revenues are collected, and business plans of carriers and shippers alike are formulated in reliance on established and effective rates. Carriers also have proceeded on the premise that tariff rates, if not unreasonably high, may be retained by them and are not liable to be repaid based on some defect unrelated to the substance of the rate.

In one of its earliest decisions under the Act, this Court said that "before any party can recover under the act he must show not merely the wrong of the carrier, but that the wrong has in fact operated to his injury." *Parsons v. Chicago & N. W. Ry.*, 167 U.S. 447, 460 (1897). Even for tariff provisions specifically declared by the Act to be unlawful, a shipper is not entitled to a refund "without other proof of actual damage." *Davis, supra*, 246 U.S. 403, 415.[8] As this Court explained in *Pennsylvania R.R. v. International Coal Mining Co.*, 230 U.S. 184,200 (1913), Congress

[8] The ICC's earlier policy did not compel a refund of all charges collected under a tariff filed without strict compliance with the provisions for tariff filing. See for example *Ralston Purina Co. v. Atlantic B. & C. R.*, 174 I.C.C. 722 (1931); *Concrete Engineering Co. v. Baltimore & O.R.*, 160 I.C.C. 675 (1930); *Southern Transportation Co. v. Norwalk & W. Ry.*, 147 I.C.C. 29 (1928);

did not intend to enable "persons not injured" to recover under the Act.

In *Reiter v. Cooper*, 507 U.S. ___, 113 S. Ct. 1213 (1993) the Court recently reaffirmed the long-standing principle that shippers may obtain redress only for actual injuries sustained and then only pursuant to specific remedies accorded by the Act itself. 113 S. Ct. at 1219. Significantly, the shipper in *Reiter* argued that the rates contained in the carrier's tariff were unlawful, i.e. unreasonable, thus precluding the carrier's recovery of tariff charges. The Court, while allowing the shipper to assert its unreasonable rate claim as a setoff against the carriers claim for tariff charges, specifically found such setoff to arise from the reparations provision of the Act, 49 U.S.C. §§ 11705(b)(3) which:

> . . . gives shippers an express cause of action against carriers for damages (called "reparations" in the pre-codification version of the statute, see 49 U.S.C. § 304(2), (5) (1976 ed.)) in the amount of the difference between the tariff rate and the rate determined to be reasonable by the ICC, § 11705(b)(3)

113 S. Ct. at 1217.

Congress established clear and specific limits on the fines and other penalties that may be imposed upon carriers under the various express penalty provisions set forth in the Act. Despite such precision, the Court of

Greene Cananea Copper Co. v. Chicago R.I. & P. Ry., 88 I.C.C. 225 (1924). The Commission in these cases repeatedly rejected arguments that a filed tariff should be treated as nonexistent because it was inconsistent with a Commission order.

Appeals contends that Congress, in the single bland sentence of section 10762(a)(1), authorizing the ICC to prescribe information to be contained in tariffs, has conferred upon the Commission undefined and unlimited discretion to retroactively void effective tariffs. Given the principles that have guided the interpretation of the Act in the past, such a construction is wrong as a matter of law.

CONCLUSION

For the foregoing reasons, the Riss rate tariff is effective and the judgment of the Court of Appeals below should be vacated.

Respectfully submitted,

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No. 93-284

In The

Supreme Court of the United States

October Term, 1993

SECURITY SERVICES, INC.,

Petitioner,

v.

K MART CORPORATION,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

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QUESTION PRESENTED

Whether, consistent with the filed rate doctrine, a carrier can enforce an incomplete tariff that is inapplicable by its own terms and void by operation of law.

STATEMENT PURSUANT TO RULE 29.1

Parent Company

Kmart Corporation (MI)
Divisions:
Kmart
Kmart Fashions
Super Kmart

Major Subsidiaries

Borders, Inc. (DE)
Builders Square, Inc. (DE)
Huck Fixture Company (IL)
Kmart Canada Limited (Canada)
JAF, Inc. (DE)
Kmart Properties, Inc. (MI)
OfficeMax, Inc. (OH)
PACE Membership Warehouse, Inc. (CO)
PayLess Drug Stores Northwest, Inc. (MD)
The Sports Authority, Inc. (DE)
Walden Book Company, Inc. (NY)
MAJ a.s. (CZ)
Kmart CR a.s. (CZ)
Kmart SR a.s. (SL)
Kmart Services s.r.o. (CZ)

Other Kmart Subsidiaries

Big Beaver of Caguas Development Corporation (MI)
Big Beaver of Caguas Development Corporation II (MI)
Big Beaver Development Corporation (MI)
Big Beaver of Carolina Development Corporation (MI)
Builders Square Limited (UK)
Canton Provision Company (MI)

STATEMENT PURSUANT TO RULE 29.1 – Continued

ILJ, Inc. (AK)
KLC, Inc. (TX)
KM Holding Company (MD)
Kmart Apparel Leasing Corp. (NJ)
Kmart Apparel Service of Atlanta Corp. (GA)
Kmart Apparel Service of Des Plaines Corp. (IL)
Kmart Apparel of Puerto Rico Corp. (PR)
Kmart Apparel Service of Sunnyvale Corp. (TX)
K mart Far East Limited (Hong Kong)
K mart Limited (UK)
Kmart International Services, Inc. (DE)
Kmart Pharmacies, Inc. (MI)
Kmart Trading Services, Inc. (MI)
Kmart Travel Services, Inc. (MI)
Kresge Foreign Sales Corporation (Barbados)
Media Momentum, Inc. (MI)
OfficeMax Limited (UK)
PACE Membership Warehouse Limited (UK)
PayLess Drug Stores Limited (UK)
PMB, Inc. (TX)
S. S. Kresge Company (MI)
S. S. Kresge Company (Australia) Pty. Ltd. (Aust.)
Sourcing and Technical Services, Inc. (FL)
STI Merchandising, Inc. (MI)
The Sports Authority International Limited (UK)
Walden Book Company Limited (UK)

Other Equity Holdings

K mart Holdings Pty., Limited (Aust.)
Coles Myer Limited (Aust.)
Independent Holdings Limited (Aust.)
K mart Overseas Corporation (NV)
Coles Myer Limited (Aust.)

STATEMENT PURSUANT TO RULE 29.1 –
Continued

K mart Holdings (New Zealand) Limited (NZ)

K mart Taiwan Limited (Taiwan)

Meldisco subsidiaries of Melville Corporation

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No. 93-284

In The

Supreme Court of the United States

October Term, 1993

SECURITY SERVICES, INC.,

Petitioner,

v.

K MART CORPORATION,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 1b-24b) is reported at 996 F.2d 1516. The order and decision of the United States District Court for the Eastern District of Pennsylvania granting summary judgment for respondent (Pet. App. 1a-16a) is unreported.

STATUTES AND REGULATIONS INVOLVED

The relevant portions of 49 U.S.C. §§ 10321, 10702(a), 10705(b)(1), 10741, 10761(a) and 10762, and 49 C.F.R. Part 1312 are set forth in Appendix A to this brief.

STATEMENT OF THE CASE

This case forms the latest installment in a trilogy of recent decisions reviewed by this Court involving the "filed rate doctrine" first announced in *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94 (1915), and more recently revisited in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), and *Reiter v. Cooper*, 113 S. Ct. 1213 (1993).

This case has three distinctive features: (1) application of the filed rate doctrine here adversely affects the *carrier* rather than the shipper; (2) the tariff relied upon by Petitioner was *incomplete* at the time of movement and thus incapable of calculating freight charges; and (3) this case involves two-component *mileage* rates rather than the more traditional rate per 100 pounds. Petitioner's claims are invalid because Riss opted to publish its mileage rates utilizing *two* tariffs and allowed one to expire, thus invalidating the other.

1. The Regulatory Scheme

Under the Interstate Commerce Act, motor common carriers engaged in interstate transportation must publish their rates in tariffs and file them with the Interstate Commerce Commission (ICC). 49 U.S.C. § 10762(a)(1).

The Act authorizes the Commission to "prescribe" the "other information that motor common carriers shall include in their tariffs," *id.*, as well as "the form and manner of publishing, filing, and keeping tariffs open for public inspection." 49 U.S.C. § 10762(b)(1). Carriers "may not charge or receive a different compensation" for their transportation services "than the rate specified in the tariff." 49 U.S.C. § 10761(a).

Those provisions are aimed at facilitating a shipper's knowledge of applicable transportation charges and preventing preferential or discriminatory treatment of transportation users. To achieve those goals, "this Court has read the statute to create strict filed rate requirements and to forbid equitable defenses to the collection of the filed tariff." *Maislin*, 497 U.S. at 127. " 'Deviation from [the filed tariff] is not permitted . . . . Shippers . . . are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable.' " *Id.*, quoting *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. at 97 n.9. "This rigid approach was deemed necessary to prevent carriers from" granting preferential treatment through purposeful rate misquotations or other techniques. *Maislin*, 497 U.S. at 127.

Each carrier has the statutory responsibility for establishing its own rates. *See* 49 U.S.C. §§ 10702(a), 10762. A carrier may carry out that responsibility by publishing its rates in individual tariffs or by joining in and incorporating by reference tariff provisions filed by other carriers or agents. To exercise the latter method, a carrier must, under the Commission's regulations, formally participate in the tariff of the other carrier or agent. 49 C.F.R. § 1317.27(e). A carrier may not do that "unless a power of

attorney or concurrence has been executed. Absent effective concurrences or powers of attorney, tariffs are void as a matter of law." 49 C.F.R. § 1312.4(d).

As early as 1939, the ICC warned carriers of the serious consequences of failing to maintain ongoing compliance with tariff participation requirements. *Cancellation of Participation in Agency Tariffs*, 4 Fed. Reg. 4440 (1939) (*ICC 1939 Order*).[1] The Commission there "call[ed] the attention of all interstate common carriers by motor vehicle . . . to their obligations" in this area. Opp. to Pet., App. 3. The Commission advised that "failure of a carrier to pay the established dues of such organization, or to comply with the by-laws, . . . " results in the agent's cancellation of the carrier's participation in the agent's tariff. *Id.* "Such cancellation," the Commission admonished, "makes the use of rates in such tariffs by that carrier unlawful" because the "tariff then becomes incomplete." *Id.* at App. 3-4.

The participation requirement is a logical outgrowth of the statutory responsibility placed on each carrier to establish and file its own rates. *See* 49 U.S.C. § 10762(a)(1). It is designed to insure that a carrier is bound by the rate actions of its agents (including modifications to the referenced tariff) and that it has affirmatively authorized actions on its behalf. "A concurrence or power of attorney fulfills this function" by "demonstrat[ing]" that the carrier "accepts responsibility for, and has participated in any rate changes made by the rate

[1] The ICC's 1939 order is set forth in Appendix C to Respondent's Reply in Opposition to the Petition for Writ of Certiorari ("Opp. to Pet.").

bureau, either directly, through voting, or indirectly through instructing its agent to embrace the changes for its account." *Wonderoast, Inc. – Transp. Systems International, Inc.*, 8 I.C.C.2d 272, 278 (1992), aff'd *sub nom. Lovett v. Wonderoast*, 145 B.R. 40 (Bankr. D. Minn. 1992). "A power of attorney or concurrence provides the necessary link," under the statutory scheme, between the carrier and entities acting on its behalf in establishing and modifying tariff charges. *Id.*

2. Mileage Rates

In general, there are two types of rates: weight based and mileage based. Weight-based charges have traditionally been the most prevalent type of rate. From the carrier's standpoint, they consist of a single element – the charge per unit of weight (usually 100 lbs.). The *shipper* is then required to state on the bill of lading the second element needed to compute the freight charge – namely, the weight of the shipment. (Cents per 100 lbs. x weight = freight charge.)

By contrast, mileage rates, which began being used with greater frequency with the increased rate-making flexibility introduced by the Motor Carrier Act of 1980, Pub. L. 96-296, 94 Stat. 793 (1980), require the *carrier* to publish two distinct but interdependent components: the rate per mile and the distance between the origin and destination. To obtain the charge for a transportation movement, the two components are multiplied together (rate per mile x distance = freight charge). Consequently, a carrier can effectively change the applicable freight charge by altering either element of the equation.

As the court below noted, when a carrier elects to file a mileage-based rate, "it must provide both components to allow a shipper to calculate transportation costs for a given shipment. If a tariff is incomplete because one or the other of these components is missing, the shipper cannot put the tariff to its intended use." Pet. App. 7b. Thus, publishing one component of a mileage-based rate without the other is meaningless.

The ICC's tariff regulations prescribe three alternative methods of publishing the distance component of a mileage rate: (1) by attaching a map to the tariff, (2) by listing specific distances between each set of origins and destinations, or (3) by participating in a separately published standardized distance scale, commonly known as a mileage guide. 49 C.F.R. § 1312.30(c)(1). A distance scale or mileage guide is itself a tariff that must be filed with the Commission. *Jasper Wyman & Son – Petition for Declaratory Order – Certain Rates and Practices of Overland Express, Inc.*, 8 I.C.C.2d 246, 251 (1992). It is usually published by an agent on behalf of a large segment of the motor carrier industry due to the substantial cost of compiling and updating highway mileages for truck routes.

When a carrier chooses to publish mileage rates and to refer to a filed mileage guide tariff for distances, its participation in that tariff is mandatory to prevent discrimination. A carrier participating in a mileage guide tariff must apply the published distances in effect on the date of movement rather than actual miles travelled. Otherwise, it would be able to grant preferential treatment to favored shippers by computing lower rates based on shorter routes. Moreover, distances between the same origins and destinations vary among guides, (and even

between different editions of the same guide), because of route variations between different mileage publications, changes resulting from new highway, bridge and tunnel construction, completion of and construction on the Interstate Highway System, and other developments.

Under the Commission's regulations, it is vital that a carrier relying on a standardized distance scale keep a concurrence or power of attorney in effect to ensure continuing participation in the mileage guide. Consistent with long-established principles, if the carrier lets the concurrence or power of attorney lapse, thereby causing its participation in the distance tariff to be canceled, its mileage tariff "then becomes incomplete" (*ICC 1939 Order*) and thus "void as a matter of law." 49 C.F.R. 1312.4(d).

3. This Case

In 1984, Petitioner, Security Services, Inc. f/k/a Riss International Corporation (Riss), elected to publish mileage rate tariff 501-B, which referred to an agent's mileage guide tariff as the source of standardized distances between all points that the carrier served. J.A. 27. That tariff, the Household Goods Carriers' Bureau (HGB) Mileage Guide Tariff No. ICC-HGB 100, contained a prominent note at the outset that precluded use of the distances published therein by carriers not listed in its Participating Carrier and Scope Tariff No. ICC HGB 107-A. The note stated:

> NOTE: THIS MILEAGE GUIDE MAY NOT BE EMPLOYED BY A CARRIER AS A GOVERNING PUBLICATION FOR

> THE PURPOSE OF DETERMINING TRANSPORTATION RATES BASED ON MILEAGE OR DISTANCE UNLESS CARRIER IS SHOWN AS A PARTICIPANT IN THE ABOVE NAMED TARIFF.

J.A. 35.

Although Riss was listed as a participant in HGB 100 when it originally published mileage rate tariff 501-B, Riss was canceled from HGB 100 effective February 19, 1985, because of its apparent failure to pay the required participation fee for that year. *Security Services, Inc. f/k/a Riss International, Inc. v. K Mart*, Pet. App. 15b. The HGB effectuated the cancellation through publication of Supplement No. 17 to the HGB 107-A Tariff. J.A. 13-19. The supplement listed Riss with the symbol # beside its name. The notes to the tariff provided the following explanation:

> # – Cancel carrier's participation. For application of rates, rules or other tariff provisions, see tariffs lawfully on file.

J.A. 24. Consistent with the express terms of the "Note" in the mileage guide tariff, Riss was no longer a participant in HGB 100 as of February 19, 1985. From that date forward, Riss' mileage rates, although remaining on file with the ICC, were incomplete because they were incapable of calculating freight charges and thus void under Commission's regulations.

"On April 17, 1986, Riss and K Mart entered into a contract under which Riss agreed to transport goods on behalf of K Mart and K Mart agreed to pay for Riss' services at the rates specified in the contract." Pet. App. 3b. Riss' contract rates were lower than the common carrier mileage rates that had become void under the Commission's regulations more than a year earlier.[2] Riss performed transportation services under the contract from November 1986 through December 1989, and K Mart compensated it in accordance with the contract rates.

In November 1989, Riss filed a chapter 11 bankruptcy petition. Pet. App. 4b. After undergoing a corporate reorganization, the debtor-in-possession, Security Services, renounced the contract with K Mart and filed a complaint in the U.S. District Court for the Eastern District of Pennsylvania to collect the difference between the negotiated contract rates and Riss' common carrier mileage rates. The amount sought in this case is $465,000 plus interest, but this issue is of "industry-wide importance" because numerous other common carriers are seeking many millions of dollars in additional freight charges based on tariffs which are similarly void as a matter of law due to the carriers' failure to participate in agents' tariffs.[3] *See, Jasper Wyman & Son*, 8 I.C.C.2d at 247.

4. Proceedings Below

The District Court granted summary judgment for K Mart. It reasoned that "[i]n essence, in this case there was

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[2] Although K Mart asserted the existence of the contract as an affirmative defense, the District Court ruled that the ICC had primary jurisdiction over that issue as well as the unreasonableness of the rates, and ruled only on the validity of Riss' mileage rate tariff. Pet. App. 3b n.1.

[3] See Appendix B, *infra*, for a list of such carriers. Several Circuit Courts of Appeals have stayed similar appeals pending this Court's decision herein. See Appendix C.

no filed tariff . . . upon which a computation of the [alleged] undercharge could be made." Pet. App. 12a. In the district court's view, the carrier's "reference without participation in the mileage guide" was "ineffective, and therefore there was no effective filed tariff as to the mileage charges." Pet. App. 13a. It rejected the argument that "the Riss tariff substantially complied with ICC tariff requirements and therefore are fully enforceable" as "akin to an equitable argument[,]" which under *Maislin*, has no place in the "rigid" world of the filed rate doctrine. Pet. App. 12a.

The Third Circuit affirmed. It noted that, "[u]nder the relevant law, Riss' tariff was void when K Mart made its shipments in 1986 through 1989 because any power of attorney it previously may have issued became ineffective in 1985, 49 C.F.R. § 1312.4(d), and a void tariff cannot support the undercharges." Pet. App. 15b. Because the Court of Appeals viewed § 1312.4(d) as operating "to declare a tariff retroactively void," it believed that the validity of the remedy in this case had to be evaluated in light of the two-pronged test of *ICC v. American Trucking Ass'ns*, 467 U.S. 354, 367 (1984). Pet. App. 17b-18b. That test permits the Commission to reject retroactively a filed tariff that has gone into effect only when it "further[s] a specific statutory mandate" and is "directly and closely tied to that mandate." *ICC v. ATA* at 367.

The Third Circuit concluded that the Commission's void-for-nonparticipation rule satisfies both prongs of the test. First, the rule "furthers a specific statutory mandate by furthering the disclosure of the identity of carriers participating in governing separate tariffs." Pet. App.

19b. Second, the rule provides a simple and straightforward way of promoting compliance with the statutory mandate of open disclosure of carrier participation in the tariff schedules of others. Pet. App. 19b-20b.[4]

SUMMARY OF ARGUMENT

1. The filed rate doctrine requires strict application of filed tariffs. It applies equally to carriers and shippers. A tariff which, by its own terms, has no application to a carrier on the date of movement may not be used by that carrier to collect additional freight charges because it

[4] Effective Dec. 3, 1993, Congress enacted legislation to provide partial relief from undercharges, the Negotiated Rates Act of 1993 (NRA), Pub. L. 103-180, 170 Stat. 2044. However, this new law does not address the sole issue before the Court in this case. It would apply to the claims against Respondent only if the Court were to reverse the decision below. In that event, Respondent's other affirmative defenses of contract carriage and Riss' unreasonable rates and practices would be available. The NRA codifies case law recognizing the Commission's primary jurisdiction over contract carriage disputes (Sec. 8). With respect to shipments made prior to September 30, 1990, the NRA permits the Commission to find it to be an unreasonable practice to collect the difference between its negotiated rate and its tariff rate under limited circumstances (Sec. 2(e)). It also prescribes criteria to be applied by the Commission in determining the reasonableness of past rates sought by non-operating carriers (Sec. 2(g)). In the case of an incomplete tariff, however, none of these issues need be reached. They simply provide additional grounds on which an undercharge claim might be rejected if a carrier otherwise had a filed rate in place at the time of the shipments at issue.

does not embody a "filed rate" applicable to that movement.

A carrier electing to use mileage rates must publish both the rates and a standardized distance scale in a filed tariff. One without the other is not enough to permit a shipper or carrier to calculate the applicable freight charge. Riss initially filed a mileage rate tariff that incorporated by reference a distance scale published by its duly authorized agent, the Household Goods Carriers' Bureau. The distance scale tariff listed Riss as a participating carrier, and accordingly gave constructive notice of the applicable mileage for movements under Riss' mileage rate tariff.

When Riss stopped paying its required participation fee to its agent in 1985, the agency relationship ended and Riss' participation in the HGB mileage guide tariff was canceled. A supplement to the mileage guide tariff expressly noted that Riss had been canceled and removed Riss from the list of participating carriers. The mileage guide tariff also gave prominent notice that the mileages applied only to carriers listed as participants in the tariff. As of 1985, therefore, the transportation community, including both Riss and its auditors, had constructive notice that the HGB distance scale no longer applied to Riss' mileage rate tariff.

From that date forward, Riss had no effective tariff on file. The shipments at issue here, which took place between 1986 and 1989, were therefore not subject to a filed rate. No shipper who consulted the tariffs on file with the ICC would have been able to compute a freight charge because there was no effective distance scale

applicable to these shipments. Riss' tariff was as incomplete and ineffective as if it had expired by its own terms. A piece of paper with the word "tariff" on it may have been on file, but a strict application of its terms, as required by *Maislin*, would not have yielded an applicable rate. Tariff debris cannot qualify as a filed rate.

The ICC has properly provided since 1939 that a carrier can incorporate a tariff by reference only if it participates in that tariff through a binding agency relationship. The Commission's regulations serve the important statutory purpose of preventing discrimination among competing shippers. In the absence of a filed and applicable distance scale providing standardized distances, a carrier would be free to reduce its freight charges for a favored shipper by calculating the mileage differently. Under Riss' tariff, for example, the carrier would have been able to adjust its freight charges for some movements by $73 per truckload simply by changing the distance between two points by a single mile. The regulations quite properly provide that a mileage rate tariff that does not include an applicable and effective distance scale is void as a matter of law.

The tariff on which Riss relies for its undercharge claim was ineffective on its face, void under controlling ICC regulations, and void under the filed rate doctrine. Petitioner has thus failed to sustain its threshold burden of proving the existence of an effective tariff upon which to base its claims, and they must fail.

II. *ICC v. American Trucking Ass'ns*, 467 U.S. 354 (1984), has no bearing on this case. At issue there was whether the ICC is empowered to reject an effective tariff

retroactively. There is no element of retroactivity involved here. Unlike the remedy at issue in *ATA*, under which rejection of a tariff rendered it "void *ab initio*" to the date of its original filing, the tariff at issue here became ineffective and void *prospectively* on the date of Riss' cancellation from the HGB mileage guide. *Id.* at 358. Both Riss and its shippers had notice from that date forward that there was no effective tariff on file. The effect was prospective only – no shipment prior to the date of cancellation was affected in any way.

ATA applies, moreover, only in the case of complete and effective tariffs. The decision does not protect a tariff like the one at issue here, which became incomplete and ineffective by its own terms when Riss' participation in the HGB mileage guide terminated.

Even if *ATA* were applicable, the ICC's regulations voiding Riss' tariff would satisfy the test that the Court applied in that case. Prospectively voiding an incomplete mileage rate tariff is "directly and closely tied" to the "specific statutory mandate" of enforcing the filed rate doctrine. 467 U.S. at 367. The regulations provide important protection against discrimination by ensuring that carriers using mileage rates have a binding and effective distance scale on file in a tariff.

ARGUMENT

I. THE FILED RATE DOCTRINE PRECLUDES ENFORCEMENT OF A TARIFF THAT BY ITS OWN TERMS DOES NOT APPLY AND THAT BECAME VOID UNDER CONTROLLING REGULATIONS BEFORE THE SHIPMENTS AT ISSUE

A. Riss Impermissibly Seeks to Enforce a Tariff That Is Inapplicable by Its Own Terms

Where a carrier seeks to enforce a tariff, it must show that the tariff is applicable to the transportation movement at issue. Here, Petitioner cannot make that showing. The distance scale tariff that it seeks to enforce is inapplicable by its own terms. Riss' effort to collect additional charges based on that tariff must therefore fail.

Riss filed a mileage-based tariff, (No. 501-B, J.A. 25-34), containing a scale of freight charges graduated by "rate base numbers," J.A. 30-32, which were based on the distances between the origins and destinations to be served.[5] Standing alone, however, that mileage rate tariff did not permit the computation of a freight charge. Such a charge could be computed only by reading the mileage rate tariff in conjunction with a separate distance tariff. Here, Riss did not publish its own distance tariff but

[5] "The Rate Base Number as used in this section is to be interpreted as meaning 'Mile'. Rate Base Numbers (mileage) will then be determined by use of the Mileage Guide No. 12, ICC HGB 100 Series, Household Goods Carriers' Bureau, Agent." J.A. 33.

rather joined in a standardized mileage tariff, HGB Mileage Guide Tariff 100.[6]

The difficulty for Riss, however, is that, during the period in which the transportation movements at issue occurred, the HGB mileage guide tariff by its terms was inapplicable to Riss. As noted earlier, HGB No. 100-A conspicuously stated that it applied only to the participating carriers listed in the HGB Participating Carrier and Scope Tariff No. 101-B (later reissued as HGB 107-A). The Tariff read:

> **PARTICIPATING CARRIERS**
>
> For a list of participating carriers refer to "Participating Carrier and Scope Tariff No. ICC HGB 107-A, Household Goods Carriers' Bureau, Agent, Supplements thereto or reissues thereof.
>
> NOTE: This mileage guide may not be employed by a carrier as a governing publication for the purpose of determining transportation rates based on mileage or distance unless carrier is shown as a participant in the above named tariff.

That tariff specifically lists "mileage guide participants." As of February 1985, the tariff plainly indicated that Riss'

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[6] The Household Goods Carriers' Bureau (HGB) Mileage Guide Tariff No. 100-A, J.A. 27.

As an aid to the court, in view of the unusual size and nature of this tariff, Respondent has lodged with the Clerk of the Court a copy of the entire HGB Mileage Guide Tariff No. 100-A to which reference is made herein.

participation had been canceled. J.A. 14. As a consequence, after that date the mileage guide tariff, HGB No. 100-A, was no longer applicable and, by its own terms, could "not be employed" by Riss "for the purpose of determining transportation rates based on mileage or distance." J.A. 35.

Riss' effort to enforce distance tariff HGB No. 100-A for shipments transported from November 1986 through December 1989 – a period well after the tariff's applicability ceased – must be rejected. Enforcing a tariff that by its own terms is inapplicable would squarely conflict with this Court's admonition that "strict adherence" to tariff terms is an absolute requirement of the filed rate doctrine. *Maislin*, 497 U.S. at 132.

Moreover, as the Court below noted, the filed rate doctrine "charges carriers and shippers alike with constructive knowledge" of the terms of filed rates. Pet. App. 14b. Thus, knowledge of a tariff's contents (or absence of provisions) is "conclusively presumed." *Maislin*, at 127, n. 9. As stated by this Court in *Maxwell*,

> This rule is undeniably strict and it obviously must work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

Maxwell, 237 U.S. at 97. See also *Maislin*, at 128: "Despite the harsh effects of the filed rate doctrine, we have consistently adhered to it." Therefore, this rule deprives Riss of additional revenues from anticipated undercharge claims, but Riss and its auditors are charged with constructive notice of Riss' tariffs. Since Riss is depending on

the filed rate doctrine as the basis for its claims, it cannot complain if a strict application of that doctrine *voids* its claims.

In sum, Petitioner cannot collect charges based on a tariff that is inapplicable. The HGB distance tariff referred to in the mileage rate tariff that Riss published (No. 501-B) cannot be used to compute freight charges in this case. Without the distance tariff, Riss does not have the necessary tariff components to support the charges that it seeks to collect. The terms of the tariff on which Petitioner here relies are themselves sufficient to defeat the undercharge claim.

B. The Tariff Became Void by Operation of Law When Petitioner Allowed Its Power of Attorney to Lapse and Was Deleted from the Mileage Guide Tariff

Petitioner's undercharge claim is also meritless because it seeks to enforce an incomplete tariff that, under longstanding ICC regulations, is void. Those regulations govern how carriers must publish mileage rates and participate in joint tariffs, such as the HGB Mileage Guide Tariff, if they choose this method of publication. According to the ICC, approximately 12,800 motor carriers refer to the HGB Mileage Guide for distances to compute freight charges.[7]

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[7] *See United States' Petition for Rehearing*, August 1993, n.7, filed in *Overland Express, Inc. v. Interstate Commerce Commission,,* 996 F.2d 356 (D.C. Cir. 1993).

Under those regulations, a carrier choosing to refer to a separate distance tariff must formally participate in that tariff. 49 C.F.R. § 1312.27(e). It cannot do that unless it executes a power of attorney showing that it agrees to be bound by its agent's actions. 49 U.S.C. § 1312.4(d). Revocations or amendments of the power of attorney are reflected through tariff revisions. 49 C.F.R. § 1312.10(a). Absent an effective power of attorney, a mileage-based tariff is void as a matter of law. 49 U.S.C. § 1312.4(d).

Only distance guide tariffs officially on file with the Commission may be referred to by carriers. 49 C.F.R. § 1312.30(c)(4). Moreover, the agent or carrier issuing the mileage guide tariff must publish a list of participating carriers. 49 C.F.R. § 1312.13(c). The title page of the participating carrier's tariff shall state that it applies only in connection with tariffs referring to it. 49 C.F.R. § 1312.25(a). When a carrier's participation in an agent's tariff is canceled, all reference to the carrier shall be eliminated. 49 C.F.R. § 1312.25(d); § 1312.18.

The Commission's regulations implement the filed rate doctrine by requiring carriers to be named in an agent's tariff publishing a necessary component of the carriers' mileage rates. These regulations assuredly were not promulgated as a defense to undercharges. As noted earlier, the Commission more than 50 years ago warned carriers about the dire effects of being canceled from an agency tariff for failure to pay the required participation fees. The I.C.C.'s *1939 Order* was in response to many "unwitting violations of the law" resulting from cancellations of participation in agency tariffs during the early years of motor carrier regulation which began in 1935. It warned that failure to pay the dues of agency tariff

bureaus results in the cancellation of the carrier's participation in the agency tariff and that such cancellation makes the tariff "incomplete." Continued use of those rates would be unlawful.

From the very beginning of tariff regulation, the I.C.C. required carriers that opted to refer to an agent's tariff to also participate in it. 49 C.F.R. § 1312.27(e). The HGB incorporated this requirement into its Mileage Guide by prominently publishing the notice reproduced at page 16 herein. Moreover, when the ICC becomes aware of carrier noncompliance, it reacts.[8]

In 1984, the Commission revised its tariff regulations to simplify tariff procedures, *Revision of Tariff Regulations, All Tariffs*, 1 I.C.C.2d 404 (1984). The Commission explained that the 1984 revision of its tariff regulations merely removed redundancies. Due to copyright issues, the Commission refused to preclude any mileage guide publisher from filing its guide with the Commission, or to

[8] *See New England Motor Carrier Rates*, 8 M.C.C. 287, 304 (1938) (prohibiting use of tariff without participation); *Halliburton Co. v. Consolidated Copperstate Lines*, 335 I.C.C. 201, 107 (1969) (lack of participation in the tariff operated to defeat an undercharge claim); *Household Goods Carriers' Bureau, Inc. – Petition for Cancellation of Tariffs of Non-Participating Carriers*, 9 I.C.C.2d 378 (1993) (order directed at 111 carriers identified by HGB as referring to, without participating in, the HGB Mileage Guide Tariff); *National Motor Freight Traffic Association – Petition for Cancellation of Tariffs That Refer to the N.M.F.C. Classification, But Are Filed By or On Behalf of Non-Participating Carriers*, 9 I.C.C.2d 186 (1992) (same as to 49 carriers identified as referring to, but not participating in, a commodity classification tariff filed by the National Motor Freight Classification Committee).

deny any carrier's right to participate in any filed mileage guide of its choosing. *Id.* at 252. The Commission's explanation of its 1984 revision is clearly rational, particularly in light of the fact that it *did not repeal § 1312.27(e)* which states that carriers "which refer to . . . separate tariffs . . . shall also participate in those governing separate tariffs . . . ."[9] A repeal of the latter section would have had a devastating effect on the HGB and the publisher of the National Freight Classification, the two most widely referred-to joint tariffs in the motor carrier industry. No carrier would have voluntarily contributed to the cost of these publications if they could merely "refer" to these tariffs without paying annual participation fees.

Petitioner herein must be deemed to have intentionally discontinued its participation in the HGB Mileage Guide Tariff by failing to pay the required annual participation fee, and thus, was canceled from that tariff effective February 19, 1985.[10] From that point forward, Petitioner's mileage rate tariff was incomplete as it lacked an essential component needed to compute the applicable freight charges. Stated in the Commission's regulatory terms, Riss' tariff became "void as a matter of law" when Riss no longer had a mileage guide tariff published in its

[9] *Amicus* Overland's position that "the ICC specifically removed *any requirement* that carriers 'be parties to' distance guides referred to when it promulgated 49 C.F.R. § 1312.30(c)(1)(iii) and (4)" (*Amicus* Overland's Brief p. 16-21) is fallacious, as its position ignores 49 C.F.R. § 1312.27(e). *See Jasper Wyman*, at 251-252.

[10] The HGB considers a power of attorney "dead" if the carrier fails to renew it by submitting participation fees within a reasonable time after cancellation. *K Mart*, at Pet. App. 5b.

name from which freight charges could be calculated. The ICC did not "threaten" to void non-conforming tariffs, as contended by *Amicus*, Overland's Brief p. 16. It emphatically stated, in no uncertain terms, that

> Absent effective . . . powers of attorney, tariffs *are* void as a matter of law.

49 C.F.R. § 1312.4(d) (emphasis added).

Petitioner admits that a mileage guide is a tariff and that "under the ICC's view of its regulations" a "mere reference" to such a tariff without the carrier's participation therein "is not sufficient." Pet. 9, n.4. These admissions contradict Petitioner's position that the rates that Riss now seeks to collect were in "published tariffs on file with the Interstate Commerce Commission." Pet. 4. In truth, Riss published in its tariffs only *one-half* of the mileage rate equation after Feb. 19, 1985, when the claim shipments moved – a scale of charges without a standardized scale of distances. Petitioner can point to no tariff where Riss had published a distance scale *in its own name* after that date as required by § 1312.30(b) and (c)(1).

Consistent with long-established regulatory requirements, Riss' name was properly deleted from the HGB Mileage Guide Tariff. Once that happened, the HGB tariff *was no longer Riss' tariff*. Riss lost, by its own inaction, the required certainty of rates mandated by the filed rate doctrine, and its mileage rate tariff 501-B became void by operation of law. There is no basis for permitting Riss to collect additional charges relying on a void tariff.

C. The Commission's Regulations Achieve the Statutory Goal of Preventing Discrimination

"The ICC regulates interstate transportation by motor common carriers to ensure that rates are both reasonable and nondiscriminatory." *Maislin*, at 119. The ICC's tariff regulation requiring the publication of distance scales with mileage rates is designed to achieve that goal. 49 U.S.C. § 10741. For example, for movements between points for which the HGB Mileage Guide Tariff published a distance of 1001 miles, Item 161 of Riss' Tariff No. 501-B provides a charge of $1828. J.A. 31. In the absence of a tariff publishing standardized distances in Riss' name, Riss could construct a highway route via which the distance between the same two points is only one mile shorter (1000 miles), thereby reducing the charge to $1755, *a savings of $73 per truckload*.[11] Favored shippers could thus receive a substantial preference on each and every truckload to the disadvantage of their competitors by a carrier's manipulation of the routes and distances used to calculate freight charges.[12]

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[11] The difference in truckload charges is $73 between each successive mileage scale (Rate Base Number) block. J.A. 30-32.

[12] *Cf. Regular Common Carrier Conference v. United States*, wherein then Judge Scalia embraced I.C.C. Chairman Taylor's dissent in *Special Tariff Authority No. 84-04859 – Average Rates*, Application No. 3638 (decided Dec. 14, 1984) (unpublished), in striking the nebulous "average rate" rule:

> [T]he proffered rule has been cleverly crafted to permit the forwarder unfettered discretion to secretly propose whatever "average rate" it wishes.

793 F.2d 376, 380 (D.C. Cir. 1986).

Furthermore, distances between two points in the HGB 100 series mileage guide tariff change due to modifications to the Interstate Highway System, new road construction, new bridges, ferries (*Cf. M.I. O'Boyle, Inc. v. United States*, 303 F.2d 446 (Ct. Cl. 1962)), and tunnels.[13] Periodic changes in distances between combinations of two points are, therefore, published in supplements to and reissues of the HGB Mileage Guide. Any changed distances published in the HGB Mileage Guide Tariff must thereafter be utilized by the carriers participating in that tariff for the purpose of computing freight charges between those points; the actual miles traveled are irrelevant.

The Court below recognized the potential for the discriminatory use of mileage rates in the absence of a distance scale published in a filed tariff in the name of the carrier, stating:

> Because the number of miles between two points will vary depending on the route chosen, specification of that number precludes a carrier from favoring one shipper over another by calculating a lower charge for the favored shipper based on a shorter route. This promotes Congress's policy of preventing price discrimination.

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[13] For example, the distances between East Coast points north and south of Norfolk, Virginia, changed significantly when the Chesapeake Bay Bridge and Tunnel was constructed. As a result, all of the distances published in the HGB Mileage Guide Tariff No. 100 series had to be recalculated for movements affected by this new all-highway route.

Pet. App. 7b. This requirement produces a standardization of point-to-point distances.

The reason for this requirement is succinctly explained in *Tri-State Motor Transit Co. v. U.S.*, 490 F.2d 996 (8th Cir. 1974), wherein the court stated:

> Mileage Guide No. 8 when incorporated into the provisions of a Tariff *creates certainty* in the computation of mileage-distance from point of origin to destination. *As provided in the Guide, the determination of mileage made pursuant to its Rules is applicable regardless of the Route actually traveled by the carrier.* The certainty of this method of distance-mileage computation should only be abolished by a clear and specific exception in the terms of the Tariff.

Id. at 997 (emphasis added). As stated in *Tri-State*, the Mileage Guide Tariff also publishes rules[14] regulating the manner in which distances are to be computed when the points involved are or are not "Key Point cities" (green circled points on the HGB maps), (J.A. 36, for example) and when bridges, tunnels and ferries are involved (*See M.I. O'Boyle, supra*).[15] Thus, the distances published in this tariff govern the rates of participating carriers *regardless of the actual routes traveled.*

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[14] J.A. 35 lists only representative rules. For a complete review of the rules for constructing distances, see the original HGB 100-A lodged with the Clerk of Court.

[15] The Court's attention is specifically directed to the "General Purpose of the Mileage Guide" (to establish a uniform method of computing mileages between all points via principal highways suitable for truck travel). J.A. 35.

The ICC's regulations are designed to facilitate conformity with standardized mileage guides and to produce certainty in the computation of freight charges. As the Fifth Circuit observed:

> . . . the Commission is specifically under a statutory mandate to determine what information must be provided in every *joint tariff* and provide mechanisms to ensure that this information is provided and is accurate. Pursuant to this obligation, we believe that there is a strong presumption that *the Commission must require the disclosure of the identity of the carriers participating in every tariff.*

Freightcor Services, Inc. v. Vitro Packaging, Inc. 969 F.2d 1563, 1571 (emphasis added); Accord, *K Mart*, at Pet. App. 18b-19b. The regulations therefore implement and are in furtherance of the filed rate doctrine and the statutory objectives of preventing preferential treatment.[16]

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[16] It ill-behooves Overland Express (*Amicus* Brief, 9) to label the Commission's policies in this case as "bureaucratic nonsense" when Overland is seeking millions of dollars in undercharge claims based on the same policy – the filed rate doctrine. Since shippers are charged with constructive notice of the filed tariffs, it is immaterial whether they must engage in "treasure hunts" for rates. *Cf. Maislin*, 131 n.12. The entire shipping public is charged with constructive notice that Overland, Riss and certain other carriers were not listed as participants in the HGB 100 Mileage Guide Tariff during the periods in which claims were filed. These critical omissions from tariffs prevent the collection of additional charges now claimed from shippers, and rightly so. If these tariff rates which Riss, Overland and others are now claiming had been demanded at the time of shipment, they would undoubtedly have lost the traffic to competitors quoting the market-driven rates initially charged by these carriers. Having enjoyed the revenue from this traffic to the exclusion of their competitors, these carriers and their auditors should not now be permitted to receive the fruits of their unlawful tariffs.

II. PETITIONER'S RELIANCE ON *ATA* IS MISPLACED

A. *ATA* Has No Bearing Here Because There Has Been No Retroactive Rejection Of An Effective Tariff

The main thrust of Petitioner's position is that the ICC's tariff regulations result in an impermissible retroactive rejection of Riss' tariff, citing this Court's decision in *ICC v. American Trucking Ass'ns, Inc.*, 467 U.S. 354 (1984) (*"ATA"*). In *ATA*, this Court considered the validity of a "new remedy" devised by the ICC "to discipline motor carriers for substantial [rate] bureau agreement violations, such as unauthorized collusion or illegal bureau pressure on independent carriers." *Id.* at 357. To remedy such violations, the Commission would "reject the affected tariffs." *Id.* at 358. The "[r]ejection of an effective tariff [would] appl[y] retroactively," "render[ing] the tariff void *ab initio*." *Id.* That would have "serious consequences for affected motor carriers," exposing them to potential "overcharge liability" for "the amount by which the rejected tariff exceeded the prior tariff." *Id.*

The present case is completely different from *ATA*. It involves no retroactive rejection of effective tariffs or the voiding of tariffs *ab initio*. *Id.* Rather, this case involves ineffective tariffs that became void as a result of the

carrier's failure to maintain compliance with pertinent regulatory requirements, and the voiding is from the time of cancellation of participation, not from the original date of filing. Moreover, members of the transportation community had advance notice of the conditions that gave rise to the voiding. As a consequence, the effect was purely prospective. No transportation transaction occurring before the date of cancellation was affected.

Petitioner's argument is premised on the mistaken notion that once a tariff has gone into effect, it cannot be rendered ineffective except through retroactive revocation, thereby triggering the application of *ATA*. But filed tariffs can become ineffective in other ways as well. For example, a tariff may contain an express termination date. After that date has passed, the tariff is no longer effective, not because of retroactive rejection but by operation of its own terms. Similarly, Riss' tariff participation expired, and its tariff became void, by operation of law on a going-forward basis. The prospective operation of a termination date or a legal requirement does not effectuate retroactive rejection.

B. *ATA* Applies Only to Complete and Effective Tariffs Having Technical Defects, Not to Tariffs that Are Incomplete and Legally Void

Petitioner argues that under prior case law, since the ICC accepted Riss' mileage rate tariff for filing, it may not now declare it void by operation of 49 C.F.R. § 1312.4(d). Petitioner's position has no basis in law or fact, as the authorities cited are distinguishable. They involved complete tariffs which were capable of calculating freight

charges, whatever their infirmity under existing law. In addition, they were not subject to any statute or regulation which rendered the tariff void by reason of its defects.

ATA involved complete tariffs on file with the ICC. *ATA* relied on this Court's previous decisions which "stressed the importance of common carriers' being able to rely on *effective* tariffs on file with the Commission." *ATA*, at 364, n.7 (emphasis added). Here Riss' *rate* may have gone into effect in 1983, but after February 19, 1985, Riss had no mileage guide tariff in effect from which distances could be calculated, thereby rendering its rate tariff ineffective.

The other cases relied upon by Petitioner are also distinguishable from the instant case. *Genstar Chemical, Ltd. v. ICC*, 665 F.2d 1304 (D.C. Cir. 1981), *cert. denied sub nom., Nitrochem, Inc. v. ICC*, 456 U.S. 905 (1983), involved the publication of a *complete* rate which was increased 14% rather than the 12% increase authorized by the ICC. *Davis v. Portland Seed Co.*, 264 U.S. 403 (1924) involved a *complete* rate filed in violation of the long-and-short haul statute. *Berwind-White Coal Mining Co. v. Chicago & E.R.R.*, 235 U.S. 371 (1914) involved the filing of a complete demurrage charge "sheet" with the ICC which was held sufficient to give notice.[17] Since each of these cases involved *complete* rates from which freight charges could be readily calculated despite their *technical* violations of

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[17] *Berwind-White* was decided before *Maxwell* in which this Court announced the filed rate doctrine.

the Commission's regulations, they are inapposite to the case at bar. Furthermore, unlike the self-executing provisions of section 1312.4(d), the governing order, statute or regulation addressed in these cases did not render the offending tariff void.

Petitioner's rhetoric regarding the ICC's acceptance of tariffs with "irregularities" is to no avail in this case. Since freight charges cannot be calculated with only one half of the equation required by the terms of the tariff, the tariff is incomplete. This is a substantive defect, not a mere technicality. *K Mart* at Pet. App. 22b; *Atlantis Express, Inc. v. Associated Wholesale Grocers, Inc.*, 989 F.2d 281 (8th Cir. 1993) at 183; *F.P. Corp. v. Twin Modal, Inc.*, 989 F.2d 285 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 95 (1993). Riss' violation goes to the heart of the filed rate doctrine as embodied in the Commission's regulations, and is distinguishable from the technical, superficial defects contemplated in *Genstar*, *Davis* and *Berwind-White*.

Riss' mileage rates were rendered incomplete and void by its agent's cancellation of a published scale of distances for Riss' account. Carriers are bound by their agents' publication of tariffs made pursuant to an effective power of attorney.[18] Riss failed to sustain its burden

[18] The HGB's power of attorney form referenced by *Amicus* Overland in its Brief at p. 6, and by the D.C. Circuit in *Overland*, specifically binds carriers to the Bureau's acts on their behalf. *Overland*, at 361. It clearly states that the carrier does "hereby ratify and confirm all that said attorney and agent may lawfully do by virtue of the authority herein granted and does (do) hereby assume full responsibility for the acts and failures to act of said attorney and agent." *See, Overland's* Petition for Certiorari, J.A. 143. See copy annexed as **Appendix D** hereto. See also 49 C.F.R. § 1312.10(a).

of proof that it had an effective power of attorney with the HGB after that agent canceled Riss from participation in its Mileage Guide Tariff effective Feb. 19, 1985. Pet. App. 12b. Thereafter, Riss lacked a uniform scale of distances to determine which "Rate Base Number" applied to determine freight ~~charges for a~~ny specific movement. Although the Commission did not strike Riss' tariff following the HGB's cancellation notice, it was not necessary to take any action because Riss' mileage rates became void by their own terms. The Commission's regulations set out the requirement for participation and the consequences of failure to participate. Furthermore, the HGB Mileage Guide Tariff clearly stated the condition for participation. Consequently, there was no retroactive rejection by the Commission. *Atlantis* at 283.[19]

As a practical matter, it would have been extremely difficult, and costly, for the Commission to monitor every cancellation supplement filed by the HGB to determine whether the canceled carriers had filed another method of computing distances simultaneously with their cancellation from HGB 100.[20] As the Court observed in *ATA*, the ICC discontinued scrutinizing every tariff filing in

[19] K Mart submits that the Eighth Circuit's holding that *ATA* need not be invoked when the carrier had no effective tariff upon which to base its claims, is the better reasoned decision. *Atlantis*, at 283.

[20] See, for instance, J.A. 11-19, wherein the HGB's Supplement canceled 52 carriers' participation in the Mileage Guide Tariff effective Feb. 19, 1985. These carriers could have changed their reference to any of the other mileage guides published by the HGB, such as those listed at J.A. 24, the HGB's Zip Code Mileage Guide or other methods of standardizing distances.

1979 due to budget cutbacks and reductions in personnel. *ATA* at 360, n. 4. Given the number of participants in the HGB Mileage Guide Tariff 100 (approximately 12,800),[21] monitoring that tariff alone for cancellations would have been a Herculean task for the Commission and an unacceptable burden on taxpayers.[22] However, this change did not relieve *carriers* of their responsibility to comply with the I.C.A. and ICC's regulations.[23]

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[21] *Amicus* Overland Express' affiant grossly misstates the number of non-participants that referred to the HGB Mileage Guide Tariff as totaling "over 15,000 carriers," based on an unsubstantiated press report estimating that only 40% of the companies using that mileage guide had a power of attorney on file. *Amicus* Brief, App. 9. "Using" a mileage guide is not equivalent to "referring" to that tariff within the meaning of 49 C.F.R. § 1312.27(e). Furthermore, the HGB found only 111 carriers not participating in its mileage guide when it finally took action to police carriers' reference to the guide in their tariffs. See n.8 herein.

[22] The burden to police lawful participation in the HGB Mileage Guide Tariff *was on HGB as the publisher*, not the ICC, as the HGB derives funds for the compilation of its voluminous Mileage Guide from its dues and participation fees. The HGB finally recognized this obligation in 1993 by petitioning the ICC to strike delinquent carriers' tariffs from the ICC's files. See petitions for *Cancellation of Tariffs* cited at note 8 herein. Prior to the Commission's striking of such non-complying carrier's tariffs, those tariffs were incomplete and thus void as a matter of law. *Amicus* Overland's position that the ICC's regulations shifted the burden of enforcement to carriers was properly rejected by the Commission in *Jasper Wyman* at 251-252. (*Amicus* Overland's Brief 12-17.)

[23] See 49 C.F.R. § 1312.1(f): *Carrier liability*. The tender of a tariff and its receipt by the Commission does not relieve the carriers of liability for violations of the Act, other laws *or the Commission's regulations*. (Emphasis added.)

C. Alternatively, *ATA*'s Criteria Are Satisfied by the ICC's Regulations

Even if *ATA* is deemed applicable, the remedy fashioned by the Commission's regulations is clearly in furtherance of its statutory responsibility to enforce the filed rate doctrine, to promulgate tariff publishing regulations and to prevent unreasonable discrimination. This Court held in *ATA* that retroactive rejection of a tariff found to be in violation of the antitrust laws *was* an appropriate remedy when the Commission's discretionary power furthers a specific statutory mandate and the exercise of that power is directly and closely tied to that mandate. *ATA*, at 367.

There can be no dispute over the Commission's discretionary power to reject tariffs containing either defects in form or substance. *ATA* at 359, n. 3. The sole question in *ATA* was whether, after retroactively rejecting a complete tariff, thus finding the tariff to be void *ab initio* (*Id.* at 360), the carriers can be held liable for the entire amount by which their unlawful rates exceed the previous rates, and not just for the resultant damage. *Id.* at 361, n. 5. This Court held that "§ 10762(e) does not license the Commission to reject effective tariffs."[24] *ATA*, at 364. However, the retroactive rejection in that case was within its power to "take actions that are 'legitimate, reasonable and direct[ly] adjunct to the Commission's explicit statutory authority.' " *Id.* at 365. Furthermore,

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[24] Throughout *ATA*, this Court limits its discussion to the retroactive rejection of "effective" tariffs. An *incomplete* tariff has *no* effect since it is incapable of constructing freight charges.

> [t]he doctrine of ICC discretion arose out of a recognition that, since drafters of complex rate-making statutes like the ICA neither can nor do "include specific consideration of every evil sought to be corrected," the absence of express remedial authority should not force the Commission "to sit idly by and wink at practices that lead to violations of [ICA] provisions."

Id.

The question in this case is whether carriers that provided service based on negotiated, unfiled rates in violation of §§ 10761 and 10762 and the Commission's regulations, may later seek additional freight charges based on *incomplete* tariffs. Petitioner respectfully submits that both the filed rate doctrine and the ICC's tariff regulations bar such recoveries. Congress did not envision, when it enacted the Motor Carrier Act of 1980 (Pub. L. 96-296, 94 Stat. 793), that wholesale violations of the filed rate doctrine would ensue.[25] Nor did the Commission anticipate this "evil" when it discontinued its tariff scrutiny practices and relied on carriers to continue to charge only the rates filed in their tariffs as required by law. When these unlawful practices were brought to the Commission's attention, it did not "sit idly by and wink at practices that led to violations of [ICA] provisions." *ATA*, at 365. It properly applied its regulations and ruled

---

[25] The Government Accounting Office's Report entitled "TRUCKING TRANSPORTATION – Information on Handling of Undercharge Claims," GAO/RCED-93-208FS, August 1993, reported that 48 of the 290 known bankrupt motor carriers filing undercharge claims are seeking $1.22 billion from shippers. *Id.* at pp. 2, 24. In the aggregate, the total amount being sought by *all* bankrupt carriers is estimated to be $3 billion.

that carriers and their successors had no valid claims. *Jasper Wyman & Son*, at 248.

Riss' position is that any tariff is considered "on file" if it has been sent to the Commission and had not been rejected at the outset. Pet. 16. This is not necessarily true. For instance, a tariff found in the ICC's files which is later admitted to have been fraudulently altered by the carrier's president presumably would have no legal effect.[26] Similarly, a tariff containing rates over which the ICC had no jurisdiction would have no legal effect.[27] Tariffs which have expired by their own terms may be "on file" with the Commission, but are no longer effective. To the same effect would be tariffs which by their own terms are so incomplete that they are incapable of performing their intended purpose – calculating freight charges.

Here, the specific statutory goal met by the Commission's regulations is to enforce the filed rate doctrine and to prevent discrimination when carriers publish mileage rates through the use of an agent's mileage guide tariff (joint tariff), but fail to participate in that tariff, thus leaving the carrier free to use lower mileages for preferred customers than those published in the mileage

---

[26] See *U.S. v. L. Robert Tannenbaum*, Criminal No. 92-652 (E.D. Pa.) wherein the President of A-Line, Ltd. was convicted for using a counterfeit ICC tariff acknowledgment stamp to authenticate tariff supplements which he altered and surreptitiously substituted during a visit to the ICC's official tariff file with the intent of validating $17 million in undercharge claims.

[27] Carriers occasionally include in their interstate tariffs rates which apply only on intrastate movements, exempt commodities, water or air movements, and movements within exempt commercial zones.

guide tariff. The Commission's remedy for this patent violation of the filed rate doctrine was to declare the carrier's rate tariff to be "void as a matter of law." Thus, 49 C.F.R. § 1312.4(d) is merely a restatement of the filed rate doctrine – all tariffs relied upon by a carrier must be published in that carrier's name. Thus, the first prong of *ATA*'s two-prong criteria is met.

The Court below concurred in the Fifth Circuit's finding in *Freightcor* that the I.C.C. met the second criterion in *ATA*:

> The ICC regulations prescribe a simple method for compliance with the statute and declare that tariffs that do not comply with important statutory mandates are void. . . .
>
> Although the use of voiding as a method of compliance is potentially a harsh measure, we are satisfied that the Commission has not exceeded its discretion by determining that tariffs are void if they fail to comply with formalities that serve important statutory purposes.

Pet. App. 19b-20b.

This Court was rightfully concerned in *ATA* with exposing operating carriers to overcharges if the Commission were to have the power to reject effective tariffs retroactively. However, that is not an issue when *bankrupt* carriers are retroactively seeking to renounce their negotiated rates and contracts, and apply incomplete tariffs. There is no specter of overcharge claims against defunct carriers.

Contrary to Petitioner's assertion, Congress did not intend to restrict the Commission's discretionary powers

to those provided in 49 U.S.C. § 10762(e). This statute does not require the Commission to reject an incomplete tariff. The statute is merely permissive.

The Court below did not interpret this section as prohibiting the Commission's promulgation of § 1312.4(d). It stated:

> Here, the remedy the ICC adopted under section 1312.4(d) is not the exercise of the power of rejection; rather, it is a remedial power to declare a tariff void from the moment a carrier does not effectively concur or maintain a power of attorney to support its participation in a governing separate tariff. The remedial power in this case is in some respects broader than the remedy examined in *American Trucking*: it not only would apply to void a tariff *ab initio* because an effective concurrence or power of attorney did not exist when the tariff was filed; *it also allows the voiding of a tariff that was originally accompanied by the required concurrence or power of attorney at some later date if the concurrence or power of attorney becomes ineffective.*

Pet. App. 17b (emphasis added). Thus, Riss' tariff 501-B was properly accepted for filing by the I.C.C. on August 20, 1984, as Riss was a participant in the HGB Mileage Guide at that time. When Riss was deleted from HGB 100 effective Feb. 19, 1985, its rate tariff was incapable of computing freight charges, and thus was ineffective and void. Even if Riss had *never* executed a power of attorney, and its name was never in the HGB Mileage Guide Tariff,

the Commission's failure to reject its incomplete tariff could not fill the void created by Riss' omission.

III. THE COMMISSION'S REGULATIONS PROVIDE AN APPROPRIATE REMEDIES FOR INCOMPLETE TARIFFS

Petitioner mischaracterizes the Commission's regulations as a "remedy" for Riss' failure to file a complete mileage rate tariff. Riss had three options for filing mileage rates. 49 C.F.R. § 1312.30(c)(1). Riss opted to use the third alternative by referring to an agent's distance guide tariff, but its participation therein was later canceled. The Commission's tariff regulations merely restate the filed rate doctrine. In the absence of an effective power of attorney, a carrier's name cannot lawfully appear in an agent's tariff and, therefore, its tariff is "void as a matter of law." 49 C.F.R. § 1312.4(d).

The Commission does not express a "claim of authority to reject effective tariffs" through this regulation as alleged by Petitioner. Pet. 17. The Commission's regulations merely state in regulatory detail the warning given to the public in 1939 and in effect for more than 50 years: that if a carrier's participation in an agent's tariff is permitted to lapse, its rate tariff then becomes *incomplete*.[28] An incomplete tariff is incapable of constructing

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[28] The example given in the 1939 Order related to cancellations from the classification tariff, but the principle applies to all references to agency tariffs such as the HGB Mileage Guide. *Wonderoast, Inc. – Transp. Systems International, Inc.*, 8 I.C.C.2d 272 (1992), *aff'd sub nom. Lovett v. Wonderoast, et al.*, 142 B.R. 40 (Bankr. D.Minn. 1992).

freight charges.[29] Courts may not *create* tariff provisions to fill the void created by a carrier's omission since "a federal court has no jurisdiction to enter an order that operates to fix rates." *Burlington Northern Inc. v. United States*, 459 U.S. 131, 140 (1982).

Thus, Petitioner's reliance on Section 10762(e) governing how and when the Commission "may" reject a tariff is irrelevant to the case in hand. Petitioner admits that Section 10762(e) is permissive, (Pet. 17) but without citing any authority nevertheless concludes that it is a peremptory power which, if not exercised when a tariff is tendered for filing, results in the tariff becoming effective. Petitioner correctly describes the procedure for filing and rejecting tariffs, but omits discussion of the consequences of filing *incomplete* tariff matter.

Instead, Petitioner engages in a meaningless discussion of a shipper's remedy through a reparation action. Petitioner has the "cart before the horse." Riss' failure to sustain its burden of proving the existence of an effective tariff must first be adjudicated. *Vertex Corp. – Petition for Declaratory Order – Certain Rates and Practices of Southwest Equipment Rental, Inc. D/B/A Southwest Motor Freight*, 8 I.C.C.2d 701 (1992), 9 I.C.C.2d 688 (1993). The Court below properly granted K Mart's Motion for Summary Judgment. Therefore, reparations is not an issue. Even if it were, *Reiter* has settled the procedure for adjudicating counterclaims.

---

[29] In the case of a missing classification, a carrier's class rates are incomplete. In the case of a missing mileage guide tariff, its mileage rates are incomplete.

Petitioner's contention that K Mart "had an opportunity to petition the Commission before the tariff became effective to request the tariff be suspended and investigated pursuant to 49 U.S.C. § 10708," but that it failed to do so, overlooks the fact that *Riss was a participant in the HGB 100 Mileage Guide Tariff when Riss initially filed its mileage rate Tariff 501-B on Sept. 4, 1984.* Therefore, K Mart had no basis for seeking suspension of Riss' 501-B tariff when it was initially filed. When Riss was deleted from the HGB 100 Mileage Guide Tariff one year later, its mileage rates *no longer had any legal effect.* Neither K Mart nor the Commission were required to take any remedial action at that time.

The Court below missed no critical facts as alleged by Petitioner. Pet. 20. On the contrary, Petitioner has misstated the critical fact that Riss' tariff contained only one-half of the required method of publishing mileage rates. "Adherence to filed tariffs is settled law," as stated by Petitioner, but Riss is bound by that strict doctrine as well as its shippers. Petitioner must suffer the consequences of its acts and omissions, which here preclude its claim for additional freight charges.

The filed rate doctrine is a two-edged sword which must be applied strictly against the framer of tariffs (carriers) as well as shippers. Tariffs which are incapable of constructing freight charges are incomplete, and therefore, have no legal effect even when accepted for filing by the Commission. The Courts have neither the statutory authority nor jurisdiction to create rates or provisions missing from filed tariffs. Incomplete tariffs may not lawfully form the basis for undercharge claims.

Accordingly, the Commission's tariff regulations promulgated in furtherance of its statutory mandate to enforce and administer the filed rate doctrine and to prevent unreasonable discrimination were properly applied in *Jasper Wyman* and by the Court below to find that undercharge claims based on an incomplete tariff are without a lawful basis.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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January 4, 1994

APPENDIX A

STATUTES

49 U.S.C. § 10321. Powers

(a) The Interstate Commerce Commission shall carry out this subtitle. Enumeration of a power of the Commission in this subtitle does not exclude another power the Commission may have in carrying out this subtitle. The Commission may prescribe regulations in carrying out this subtitle.

49 U.S.C. § 10702. Authority for carriers to establish rates, classifications, rules, and practices

(a) A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall establish-

> **(1)** rates, including divisions of joint rates, and classifications for transportation and service it may provide under this subtitle; and
>
> **(2)** rules and practices on matters related to that transportation or service, including rules and practices on-
>
> > **(A)** issuing tickets, receipts, bills of lading, and manifests;
> >
> > **(B)** carrying of baggage;
> >
> > **(C)** the manner and method of presenting, marking, packing, and delivering property for transportation; and
> >
> > **(D)** facilities for transportation.

49 U.S.C. § 10705. Authority: through routes, joint classifications, rates and divisions prescribed by Interstate Commerce Commission

(b)(1) The Interstate Commerce Commission may, and shall when it considers it desirable in the public interest, prescribe through routes, joint classifications, joint rates (including maximum or minimum rates or both), the division of joint rates, and the conditions under which those routes must be operated, for a motor common carrier of property providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title with another such carrier or with a water common carrier of property.

49 U.S.C. § 10741. Prohibitions against discrimination by common carriers

(b) A common carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title may not subject a person, place, port, or type of traffic to unreasonable discrimination. However, subject to subsection (c) of this section, this subsection does not apply to discrimination against the traffic of another carrier providing transportation by any mode.

49 U.S.C. § 10761. Transportation prohibited without tariff

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the

rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

49 U.S.C. § 10762. General tariff requirements

(a)(1) A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this chapter for transportation or service it may provide under this subtitle. **A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs.** A motor contract carrier that serves only one shipper and has provided continuous transportation to that shipper for at least one year or a motor carrier of property providing transportation under a certificate to which the provisions of section 10922(b)(4)(E) of this title apply or under a permit to which the provisions of section 10923(b)(5) of this title apply may file its minimum rates unless the Commission finds that filing of actual rates is required in the public interest. (emphasis added).

(b)(1) The Commission shall prescribe the form and manner of publishing, filing, and keeping tariffs open for public inspection under this section. . . . (emphasis added).

* * *

(e) The Commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section.

REGULATIONS

49 C.F.R. § 1312.1(f): *Carrier liability.* The tender of a tariff and its receipt by the Commission does not relieve the carriers of liability for violations of the Act, other laws or **the Commission's regulations.** (emphasis added).

49 C.F.R. § 1312.4(d): *Concurrences and powers of attorney.* Concurrences and powers of attorney shall not be filed with the Commission. However, a carrier may not participate in a tariff issued in the name of another carrier or an agent unless a power of attorney or concurrence has been executed. **Absent effective concurrences or powers of attorney, tariffs are void as a matter of law.** (emphasis added). Should a challenge to a tariff be made on this basis, carriers will be required to submit the necessary proof. See also § 1312.10.

49 C.F.R. § 1312.10(a): *Powers of attorney.* Powers of attorney may be given by a carrier to a carrier or an agent for the purpose of publishing and filing tariffs. . . . The

power may be as broad or limited as expressed in the document, and alternate agents may be named. **Powers of attorney shall not be filed at the Commission, but shall be maintained and produced if requested by any person.** Revocation or amendment of the power of attorney should be reflected through lawfully published tariff revisions effective concurrently. In the event of failure to so revise the applicable tariff or tariffs, the rates in such tariff or tariffs will remain applicable until lawfully changed. If the scope of a power of attorney is questioned by any person, the document shall be produced. (emphasis added)

49 C.F.R. § 1312.13(c) *Participating carriers.* **(1)** (This paragraph does not apply to carriers' local tariffs.) Unless a separate participating carrier's tariff is filed, a list of the participating carriers shall be provided, showing the names of the carriers; the city and state of the principal office of the carrier; and the lead docket number of each carrier's-operating authority, if any.

49 C.F.R. § 1312.18 Supplements

(a) *Changing provisions of a bound tariff.* A supplement may be used to add, delete or change provisions of a bound tariff. General rules, in addition to rules applicable to tariffs as a whole, are provided below.

49 C.F.R. § 1312.25(a) *Separate tariffs may be filed by agents.* (1) An alphabetical list of carriers participating in agent's tariffs, along with a description of the underlying tariffs, may be filed in a separate tariff (not a rate tariff). The title page of the participating carrier tariff shall state that it **applies only in connection with tariffs referring to it.** (emphasis added). If the tariff governs tariffs issued

jointly by two or more agents, it shall be a joint issue (see § 1312.11).

49 C.F.R. § 1312.25(d) *Cancellation of participating carriers.* (1) Except as provided in paragraph (f) of this section, when a carrier's participation in a participating carrier tariff or governed tariff is canceled, **all reference to the carrier in the involved tariff(s) shall be canceled**.

(2) The cancellation may be accomplished either by –

(i) Amending all matter to eliminate reference to the carrier; or

(ii) Publishing a blanket cancellation notice.

The blanket cancellation shall be published in the participating carrier tariff and shall be referred to in the cancellation of the carrier's name. A provision referring to the canceled carrier may not be republished without concurrent cancellation of the reference to that carrier and all matter shall be amended as soon as possible.

(3)(i) In a bound tariff the canceled carrier's name (and reference to the blanket cancellation notice, if used) shall be carried forward as reissued matter in the list of participating carriers.

(ii) In a looseleaf tariff, the carrier's name (and reference to the blanket cancellation notice, if used) and the date the cancellation became effective shall be republished in successive issues of the list of participating carriers until all provisions referring to the carrier are amended. (emphasis added)

49 C.F.R. § 1312.27(e): *Participation in governing publications.* Carriers participating in tariffs which **refer** to,

and are governed by, separate tariffs (classifications, exceptions, rules etc.) **shall also participate in those governing separate tariffs,** unless specifically stated in the governed tariffs that provisions in the separate tariffs will not apply for their account. (emphasis added)

49 C.F.R. § 1312.30(b): *Method of Showing Distances.* Distance rates may be published to apply per vehicle per mile, or other unit per mile, or by establishing a rate table or segment showing a **scale of distances** for which charges will be applied. If the latter method is used, a rate shall be provided for each distance. Each State or area covered by the application of the rates shall be listed. The listing may be brief but informative as to the territorial coverage. (emphasis added)

49 C.F.R. § 1312.30(c): *Determination of distances.* (1) A tariff containing distance rates **shall contain provisions for the determination of distances by** –

(i) Publishing the distances between all locations covered by the distance rates in the tariff;

(ii) Referring to a map(s) attached to the tariff; or

(iii) **Referring to a distance guide(s)**. (emphasis added)

49 C.F.R. § 1312.30(c)(4): Except as provided in § 1312.13(e)(2), **only distance guides officially on file with the Commission may be referred to**. More than one may be referred to provided the rate tariff clearly specifies the circumstances under which each guide will apply. An agent's tariff may refer to another agent's distance guide. (emphasis added)

APPENDIX B

CARRIERS THAT DID NOT PARTICIPATE IN AGENTS' TARIFFS REFERRED TO IN THEIR TARIFFS AND WHO ARE SEEKING COLLECTION OF UNDERCHARGE CLAIMS

ATF Trucking Co., Inc.
Allegheny Freight Lines, Inc.
American Eagle Lines
BGR Transportation Co., Inc.
Brown Transport Truckload, Inc.
Bulldog Trucking
Canny Trucking Co., Inc.
Casket Distributors
Columbia Navigation
Country Wide Truck Service, Inc.
Cross E Transportation
Emporia Truck Lines
Express Transportation Co.
F.P. Corp.
Freightcor Services, Inc.
J. H. Ware
Mistletoe Transportation
Mitchell Trucking
Northeast Carriers, Inc.
Overland Express, Inc.
R.W. Joyce
Riss International Corp.
Rose Freight Lines
Rose-Way, Inc.
Sam Tanksley Trucking, Inc.
Silvey Refrigerated Carriers, Inc.
Sooner Express
Squaw Transit Co.
Transportation Systems International, Inc.
True Transport Co.
Twin Continental

United Shipping
Winning Run, Inc.
Yowell Transportation Services, Inc.
Zurek Express

APPENDIX C

Decisions Stayed by Circuit Courts of Appeal Pending the Supreme Court's Disposition of *Security Services, Inc. v. K Mart Corporation*

Growe v. Malden Mills Industries, et al., 821 F. Supp. 32 (D.Me. 1993), *appeal docketed*, No. 93-1556 (1st Cir.)

F.P. Corp. v. Golden West Foods, Inc., 807 F. Supp. 1228 (W.D. Va. July 28, 1992), *appeal docketed*, No. 92-2000(L) (4th Cir.)

Security Services, Inc. v. RPL Associates, Inc., No. 91-75705, *held in abeyance* (6th Cir. Dec. 2, 1993)

Security Services, Inc. v. Chemrex, Inc., No. 92 C 4214, 1993 WL 189865, (N.D. Ill. June 2, 1993), *appeal docketed*, No. 93-2632 (7th Cir.)

Security Services, Inc. v. All Freight Services, Inc., 1992 Fed. Carr. Cas. (CCH) ¶ 83,788 (S.D. Cal. May 4, 1992), *appeal filed*, No. 92-55785 (9th Cir.)

Pope v. Amoco Fabrics & Fibers Co., 1992 Fed. Carr. Cas. (CCH) ¶ 83,787 (N.D. Ala. 1992), *appeal docketed*, No. 92-6877 (11th Cir.)

Brizendine v. Golden Dipt Company, 1992 Fed. Carr. Cas. (CCH) ¶ 83,778 (Bankr. N.D. Ga. July 1, 1992), *rev'd*, No. 1:92-CV-2339-GET (N.D. Ga. Sept. 8, 1993), *appeal docketed*, No. 93-9186 (11th Cir.)

Brizendine v. Kumho USA, Inc., 1992 Fed. Carr. Cas. (CCH) ¶ 83,779 (Bankr. N.D. Ga. July 1, 1992), *rev'd*, Civ. No. 1:92-CV-2193-GET (N.D. Ga., Sept. 8, 1993), *appeal docketed*, No. 93-9185 (11th Cir.)

Brizendine v. Richter Distributing Company, 1992 Fed. Carr. Cas. (CCH) ¶ 83,780 (Bankr. N.D. Ga. July 24, 1992), *rev'd*, No. 1:92-CV-2437-GET (N.D. Ga. Sept. 8, 1993), *appeal docketed*, No. 93-9187 (11th Cir.)

APPENDIX D

POWER OF ATTORNEY

*ZIP ONLY**

CANCELLED TARIFF NO. 107**
SUPP. NO. _____ DTD _____
REASON O/B

VAX CANCELLED
APR 4 1989

FA2 No. 1
Cancels No. _

OVERLAND EXPRESS, INC.
(Name of courier)

8651 Naples St., N.E.
(Street address or R.F.D. number)

Blaine, MN 55434
(City, state, etc. and ZIP Code)

Docekt No. MC-133689

November 9, 1984
(Date)

This is to certify that, on the 9th day of November, 1984

OVERLAND EXPRESS, INC.
(Name of courier)

a common carrier of property by motor vehicle does (do) hereby make and appoint Household Goods Carriers' Bureau attorney and agent to publish and file for such carrier freight tariffs, and supplements or loose-leaf page

---

*Italicized materia: handwritten on original.

**Stamped onto original.

amendments thereto, as permitted or required of common carriers of property by motor vehicle under authority of the Interstate Commerce Act, and the regulations of the Interstate Commerce Commission issued pursuant thereto, and does (do) hereby ratify and confirm all that said attorney and agent may lawfully do by virtue of the authority herein granted and does (do) hereby assume full responsibility for the acts and failures to act of said attorney and agent.

OVERLAND EXPRESS, INC.
(Name of courier)

By /s/ Raymond R. Murray
(Signature of authorized person)

President
(Title)

Attest (if a corporation):

_____
(Secretary)

CORPORATE SEAL

Duplicate mailed to:
Household Goods Carriers' Bureau, Agent
3110 Columbia Pike, Suite 200
Arlington, Virginia 22204

_____
(Date)

No. 93-284

In The

Supreme Court of the United States

October Term, 1993

SECURITY SERVICES, INC.,

Petitioner,

v.

K MART CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONER

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INTERSTATE COMMERCE COMMISSION REGULATIONS

No. 93-284

In The

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SECURITY SERVICES, INC.,

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On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONER

SUMMARY OF ARGUMENT

The dispute giving rise to this litigation contrasts the enforcement of a filed tariff against an unfiled, negotiated rate specifically declared to be illegal by the plain language of the Interstate Commerce Act. This case has nothing to do with an ambiguous, ineffective or unfiled tariff. The tariff at issue in this case sets forth distance rates and a method for applying those rates. The Interstate Commerce Act clearly mandates the collection of filed tariff rates and neither the Interstate Commerce Commission ("ICC" or "Commission") nor a court has the power to subordinate a tariff to a secret, illegal rate agreement.

In the Motor Carrier Act of 1980, Congress reaffirmed the core purpose of the Interstate Commerce Act which is to provide for public filing of tariffs and the elimination of secret rate agreements outside of filed tariffs. Congress chose not to expand the existing remedies for violations of ICC promulgated tariff regulations. Under these circumstances, the existing remedies which are set forth in the Act are necessarily exclusive.

Against this backdrop of statutory rate regulation, the Government urges that the Act implicitly authorizes the ICC to declare a filed tariff to be "ineffective" if it violates a tariff publication regulation promulgated by the ICC. However, the Act and the relevant case law strictly confine the ICC's power to treat a tariff as retroactively void to limited circumstances and then only pursuant to a specific mandate of the Congress.

The Commission's "void-for-nonparticipation" rule applied by the Court of Appeals below is merely another thinly-veiled attempt by the Commission to create an extra-statutory, unregulated free-for-all where private rate agreements control interstate transportation and filed tariffs are ignored. Though the Act authorizes the Commission to prescribe information to be contained in tariffs, the ICC lacks authority to waive collection of filed tariff rates.

ARGUMENT

I. RISS TARIFF NO. 501-B WAS EFFECTIVE.

Try as they may to convince this Court that Riss Tariff No. 501-B was never effective, K Mart Corporation ("K Mart") and the Government cannot ignore the plain fact that the tariff was received, stamped, accepted, filed and never rejected by the Commission. J.A. 25-32. Clearly, the Riss 501-B tariff meets even the Commission's own espoused test for an applicable, i.e. effective, tariff. *See, Acme Peat Products, Ltd. v. Akron, C. & Y.R. Co.*, 277 I.C.C. 641, 644 (1950) ("Where tariffs are tendered to and accepted by the Commission, the rates therein become applicable, even though technically they should have been rejected upon tender.") This same definition of an effective tariff, now apparently rejected by the Commission, was used by the Court of Appeals in *Overland Express, Inc. v. Interstate Commerce Commission*, 996 F.2d 356, 361 (D.C. Cir. 1993) n. 5, *petition for cert. filed*, 62 U.S.L.W. 3420 (U.S. Dec. 3, 1993) (No. 93-883) in determining that a carrier had a valid tariff on file.

The Government relies upon the ICC decisions in *Glidden Co. v. Chesapeake & O. Ry. Co.*, 229 I.C.C. 599 (1938) and *Constitution Stone Co. v. Baltimore & O.R. Co.*, 231 I.C.C. 562 (1939) for the proposition that a rate is inapplicable even though erroneously cancelled. Petitioner does not take issue with that proposition but such a contention is irrelevant here as Riss Tariff No. 501-B has never been cancelled.

In *Glidden* the defendant carrier had erroneously caused a tariff provision to be cancelled prior to the movement of the shipments at issue therein resulting in

the imposition of a higher, applicable rate. In a complaint proceeding before the Commission the carrier had admitted that the higher, applicable rate was unreasonably high. *Id.* at 601. The Commission allowed waiver of the undercharges based on the applicable tariff because the rates contained therein were unreasonably high and not because of nonparticipation in a referenced tariff.

In *Constitution Stone Co. v. Baltimore & O.R. Co.*, 231 I.C.C. 562 (1939) a shipper, Constitution Stone Co., challenged the reasonableness of an otherwise applicable rate in a complaint proceeding before the Commission. The rates became applicable only through inadvertent cancellation of another tariff provision. The carrier admitted the applicable rate was unreasonably high. The Commission awarded reparations and allowed waiver of the undercharges. *Constitution Stone* at 565.

Contrary to the Government's contention both *Glidden* and *Constitution Stone* are inapplicable here because the rates set forth in Riss Tariff No. 501-B were never cancelled. They are also inapplicable because the cases involved rail carriers for which the Commission has authority to waive undercharges. It lacks such authority with respect to motor carriers. *See, Informal Procedure for Determining Reparation*, 335 I.C.C. 403, 413 (1969). Moreover, those two cases actually support Petitioner's contention set forth in its Brief on the Merits that challenges to the lawfulness of rates are to be made in a complaint proceeding before the Commission.[1]

[1] This same point was made by this Court in *Reiter v. Cooper*, 507 U.S. ___, 113 S.Ct. 1213, 1220 (1993) n.3.

II. Riss Tariff No. 501-B Disclosed the Precise Rates To Be Charged.

In *Berwind-White Coal Mining Co. v. Chicago & E.R. Co.*, 235 U.S. 371 (1914), this Court held that when tariff sheets and other documents are placed on file with the Commission without objection as to their form, and give notice of the rates to be charged, then the rates stated therein are effective. This is the case even if the carrier merely sends a letter disclosing rates to the Commission. *Berwind at* 375.

The Government argues that Riss Tariff No. 501-B did not give notice of the rates to be charged. Relying on the clever use of excerpts from various distance guides,[2] the Government argues that the rates in the Riss tariff are unclear or imprecise. A simple reading of Riss Tariff No. 501-B, however, discloses the distance rates to be charged. J.A. 30-32. Item 100 of Tariff No. 501-B directs the tariff user to the particular distance guide used to determine distances. J.A. 27. Significantly, Item 100 of the tariff incorporates not only the distance guide then in effect but also supplements and reissues of that same distance guide. J.A. 27. Thus, no tariff user could possibly be confused as to the applicable rate or the distance guide

[2] In either an attempt to create unnecessary confusion or out of ignorance the Government has incorporated into its brief excerpts from the Household Goods Carriers Bureau Zip Code Distance Guide. That Guide is not referred to anywhere in the Riss 501-B tariff. Thus, any person who read Riss Tariff No. 501-B could not possibly be misled into believing the Zip Code Mileage Guide is applicable for the account of Riss.

to be used at any given time period. Through its publication of Tariff 501-B Riss has bound itself to be governed by the Household Goods Carriers Bureau Distance Guide No. 100-A.

The Government claims that after February 19, 1985, when Riss was no longer named as a participant in the distance guide, a shipper who consulted the list of carriers participating in the distance guide might be confused as to the distance guide applicable for Riss. This is not the case since no carriers are actually listed in the distance guide itself. J.A. 35. Rather they are listed in Tariff No. ICC HGB 101-B, a separate tariff naming participating carriers. J.A. 11-24. Riss Tariff No. 501-B is not governed by that participating carrier's tariff but only by the distance guide. J.A. 27. Moreover, the Commission's claimed voiding power does not come into play in such a case. Rather the alleged voiding power applies when the carrier has failed to provide a private power of attorney to the publisher of the distance guide. 49 C.F.R. § 1312.4(d).

No public disclosure of rates is effected through the execution of a private power of attorney. Indeed the Commission has abolished the filing of powers of attorney. *Revision of Tariffs, All Carriers,* 1 I.C.C.2d 404, 408 (1984) ("These documents are not used by us.").[3]

[3] When the Commission overhauled its tariff regulations in 1984 and abolished the filing of powers of attorney, it stated that in amending its regulations it desired to "retain only those rules that are truely necessary to carry out the statutory disclosure function of tariffs." *Revision of Tariffs, All Carriers,* 1 I.C.C.2d 404, 405 (1984).

The disclosure of rates applicable to interstate transportation via Riss was effected through the filing of Riss Tariff No. 501-B, including its incorporation of the distance guide. No objection was ever made as to the form of the tariff. Thus the tariff is enforceable under the principle announced by this Court in *Berwind, supra.*

III. The Commission's Decision in *Jasper Wyman & Son* is Another Attempt by the Commission to Avoid Enforcement of Filed Rates.

Since at least as early as 1986, the ICC has engaged in a conscious attempt to avoid enforcing the statutory requirement of adherence to tariff rates set forth in 49 U.S.C. §§ 10761(a) and 10762(a). *See, ICC v. Transcon Lines,* 9 F.3d 64, 67 (9th Cir. 1993) ("[W]e are in the unusual situation in which an agency has a record of challenging what the judiciary has interpreted to be the very heart of the statute that gave the agency life"). While the Commission has tried various approaches to avoid enforcement of filed rates it has been rebuked by the courts. For example in *Regular Common Carrier Conference v. United States,* 793 F.2d 376 (D.C. Cir. 1986), the court held unlawful the ICC's authorization of a tariff permitting unfiled, negotiated rates to govern interstate transportation. In 1986 the Commission published its infamous decision in *NITL – Pet. to Inst. Rule on Negotiated Motor Car. Rates,* 3 I.C.C.2d 99 (1986), which was soundly rejected by this Court in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.,* 497 U.S. 116 (1990). The Commission was rebuked by the United States Court of Appeals for the Third Circuit in *White v. I.C.C.,* 989 F.2d 643 (3d Cir. 1993) when it attempted to impose rules which, *inter alia,* required a carrier to ask the

ICC for permission before it could demand payment for tariff undercharges. The Commission's decision in *Jasper Wyman & Son, et al. – Petition for a Declaratory Order – Certain Rates and Practices of Overland Express, Inc.*, 8 I.C.C.2d 246 (1992), *rev'd sub. nom., Overland Express, Inc. v. ICC*, 996 F.2d 356 (D.C. Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3420 (U.S. Dec. 3, 1993) (No. 93-883), is merely another thinly-veiled attempt to avoid adherence to tariffs.

The Government's attempt to masquerade the void-for-nonparticipation rule as a matter of longstanding policy is exposed by the following facts made evident by Amicus Overland Express, Inc.'s appendix ("Overland App."):

1. From the time the ICC amended its tariff regulation in 1984, until 1993, the ICC had never rejected, or voided distance rates filed by a carrier for failure to participate in a governing distance guide. Overland App. 8, 17-24.

2. From 1984 to 1988 approximately 15,000 carriers, or 40% of all common carriers, which filed tariffs containing distance rates, referred to the HGB distance guide without formally participating therein. Overland App. 9.

3. The ICC routinely accepted tariffs containing methods of computing distances not authorized by 49 C.F.R. § 1312.30(c). Overland App. 9-12.

4. The ICC took no action to cancel tariffs after its own enforcement branch discovered in 1990 and 1991 that certain carriers published

distance rates referring to the HGB distance guide while never participating in the distance guide. Overland App. 25-38.

Any contention that the ICC had a longstanding policy of declaring tariffs void retroactively due to non-participation in a referenced tariff rings hollow in light of the above facts.

The Government traces the origin of the Commission's "enforcement" of the void-for-nonparticipation rule to *New England Motor Carrier Rates*, 8 M.C.C. 287 (1938) (*"New England Rates"*). In *New England Rates* the Commission declared joint motor-water rates illegal because the water carrier had not evidenced its participation in the joint line rates. There the ICC did not retroactively strike the rates. Rather it suspended the rates prior to their effectiveness and upon investigation ordered that the rates be cancelled. 8 I.C.C. at 330. Here, all of the rates sought to be collected were contained in Riss Tariff No. 501-B which was never suspended or investigated by the ICC. The only participation aspect is in the reference to a mileage guide used to determine the distances. As noted in the Government's Brief, a purpose of the participation rules is to ensure that each carrier is responsible for its own rates and is not unwillingly bound by the actions of another carrier. Brief for the United States at 10. That situation is simply not present here as Riss willingly bound itself to the mileage guide distances. As noted by the Seventh Circuit in *Brizendine v. Cotter & Co.*, 4 F.3d 457 (7th Cir. 1993), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Dec. 20, 1993) (No. 93-1129), the carrier's decision to adopt the mileage guide "as its own" demonstrates that

the carrier "accepts responsibility for the publications guide," 4 F.3d at 465, n. 9.

The ICC also incorrectly cites *Halliburton Co. v. Consolidated Copperstate Lines,* 335 I.C.C. 201 (1969) as evidence of enforcement of the void-for-nonparticipation rule. The *Halliburton* case is not a tariff participation case nor did the ICC deny undercharges. Rather the Commission was presented with a simple question of interpretation of a tariff. The Commission was asked by a shipper whether or not minimum charges applied to the transportation of its freight when two of the carriers it utilized to handle the freight did not agree to waive the minimum charges.

The Commission found in *Halliburton* that because certain carriers were not party to a tariff note which listed those carriers, minimum charges did apply and the carriers were entitled to the higher charges they sought. 335 I.C.C. at 207. The issue in *Halliburton* was in no way related to a failure to participate in a tariff as that term is defined by the ICC's regulations. The Government's citation of *Halliburton* serves to highlight the weakness of its claim of ICC enforcement. *Halliburton* is clearly inapplicable here because it did not involve the voiding of a tariff and the imposition of an unfiled rate. Moreover in *Halliburton* the tariff clearly disclosed the rates and the carriers using those rates, just as Riss Tariff No. 501-B disclosed Petitioner's rates and the governing distance guide.

The court in *Overland, supra,* clearly recognized that the core purpose of the Act, public disclosure of rates, is undermined by the application of the Commission's *Jasper Wyman & Son* decision. When viewed in light of other recent Commission action it is clear that the Commission

is on a mission to avoid enforcement of tariffs. As the court in *Overland* recognized, "Complete abrogation of the filed rate is only necessary if the Commission's real purpose is to eliminate the Trustee's undercharge suits." 996 F.2d at 362.

IV. Imposition Of An Unfiled Rate Is The Antithesis Of Statutory Rate Regulation.

The Court of Appeals erred when it applied the ICC's tariff voiding regulation and failed to give legal effect to a tariff which was placed on file with the ICC, gave notice of the rates to be charged and was never rejected by the ICC or otherwise cancelled. The Government concedes that the ICC may not retroactively reject a filed tariff except within the limited confines established by this Court in *ICC v. American Trucking Associations, Inc.,* 467 U.S. 354 (1984), *reh'g denied,* 468 U.S. 1224 (1984) but contends that retroactive rejection is not at issue here because the Riss tariff which was accepted by the Commission was never really on file.

The decisions below give legal effect to an unfiled, negotiated rate agreement between the parties. However, this Court has held in no uncertain terms that secret rate agreements between carriers and their customers are circumscribed by tariffs. *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.,* 497 U.S. 116 (1990). Nevertheless the Government ignores this statutory prohibition and asserts that the ICC may fashion a remedy of voiding a tariff through the statutory authority to prescribe "other information" to be contained in tariffs. The fatal flaw in this argument is that the result of such a remedy is the imposition of an illegal, secret rate, and not the tariff rate.

The language contained in § 10761(a) of the Act is clear. There is nothing amibiguous about the Act's requirement of adherence to tariff rates. The Interstate Commerce Act could not be more explicit in prohibiting secret rate agreements such as involved here and specifying remedies therefor. The Act plainly does not provide a private remedy to a shipper allowing him to retain the fruits of an illegal bargain merely because a carrier has violated a rule which the Commission has characterized as relating to form and not substance. *Shobe, Inc. v. Bowman Transportation, Inc.*, 350 I.C.C. 664, 670 (1975). Congress has directed the ICC to enforce the Act's tariff requirements, not to eliminate them through creative interpretation of its regulations.

CONCLUSION

For the foregoing reasons, the Riss distance tariff is effective and the judgment of the Court of Appeals below should be vacated.

Respectfully submitted,

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No. 93-284

In the Supreme Court of the United States

OCTOBER TERM, 1993

SECURITY SERVICES, INC., PETITIONER

v.

K MART CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION AS AMICI CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether, under the filed rate doctrine, a motor carrier may collect a tariff rate that contains only one of two components necessary to establish a mileage-based rate, notwithstanding the Interstate Commerce Commission's longstanding interpretation of its rules governing tariff filing that such a tariff is void as a matter of law.

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INTEREST OF THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

The Interstate Commerce Commission (ICC or Commission) administers the Interstate Commerce Act (Act), 49 U.S.C. 10101, *et seq.* The United States is frequently a party to actions involving the application of the Act, 28 U.S.C. 2322, 2323, and has been a party to proceedings involving the issue in this case. Because this case involves the application of the filed rate doctrine and the validity of a Commission regulation governing tariff filings, the United States and the Commission have a significant interest in its resolution.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Act, 49 U.S.C. 10761, 49 U.S.C. 10762(a), and 49 U.S.C. 10762(b)(1), and the relevant ICC regulations, 49 C.F.R. 1312.4(d), 1312.10(a) and (b), 1312.13(c)(1), 1312.17(b), 1312.25(a)-(e), 1312.27(e), and 1312.30, are set forth in the appendix to this brief. App., *infra*, 1a-11a.

STATEMENT

The Commission has a longstanding rule that, when a motor carrier's tariff purports to establish a rate by cross-referencing another tariff, the carrier must participate in that tariff. When the carrier fails to participate in that other tariff, the ICC's rule specifies that the carrier's tariff is void as a matter of law. 49 C.F.R. 1312.4(d). In this case, the court of appeals concluded that a carrier whose tariff is void under that rule may not rely on the tariff as a basis for collecting undercharges from a shipper.

A. The Statutory and Regulatory Framework

1. Since 1935, the Commission has regulated interstate transportation by motor carriers. Motor Carrier Act of 1935, ch. 498, 49 Stat. 543. A motor common carrier providing transportation subject to regulation under the Act must publish its rates in tariffs filed with the ICC. 49 U.S.C. 10761(a), 10762(a)(1). The carrier "may not charge or receive a different compensation for that transportation * * * than the rate specified in the tariff." 49 U.S.C. 10761(a). The Court has interpreted these provisions "to create strict filed rate requirements and to forbid equitable defenses to the collection of the filed tariff." *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 127 (1990); *Reiter* v. *Cooper*, 113 S. Ct. 1213, 1219 (1993).

The Act authorizes the ICC to administer and enforce those statutory requirements, 49 U.S.C. 10321(a), 11701, 11702, and, in particular, to "prescribe the form and manner" of tariff filing, 49 U.S.C. 10762(b)(1), and the contents of filed tariffs, 49 U.S.C. 10762(a)(1). Although each carrier is responsible for establishing its own rates, see 49 U.S.C. 10702, 10762, the Commission permits a carrier's tariff to incorporate by reference rate components contained in tariffs filed by other carriers or agents. That method of setting forth a rate, however, is permitted only if the carrier formally participates in the other tariffs. 49 C.F.R. 1312.27(e). The Commission's regulations further provide that

> a carrier may not participate in a tariff issued in the name of another carrier or an agent unless a power of attorney or concurrence has been executed. *Absent effective concurrences or powers of attorney, tariffs are void as a matter of law.*

49 C.F.R. 1312.4(d) (emphasis added). That rule is known as the "void-for-nonparticipation" rule.

The ICC first articulated its requirements for participating in another carrier's tariff and its rule that a carrier's tariff is void if the carrier allows its participation in a referenced tariff to lapse in *Cancelation of Participation in Agency Tariffs*, 4 Fed. Reg. 4,440 (1939). See also *New England Motor Carrier Rates*, 8 M.C.C. 287, 304 (1938) (prohibiting use of tariff without participation). In the ensuing four decades, when changes in rates were relatively infrequent, carriers were generally diligent in complying with the participation requirement. On the few occasions when the Commission became aware that a carrier had failed to comply with the participation requirement, the ICC enforced it. *Halliburton Co.* v. *Consolidated Copperstate Lines*, 335 I.C.C. 201, 207 (1969) (lack of participation in the tariff operated to defeat an undercharge claim).

2. In the Motor Carrier Act of 1980 (MCA), Pub. L. No. 96-296, 94 Stat. 793, Congress substantially revised the transportation policy of the United States to en-

courage a more competitive environment in the motor carrier industry. Among other things, the MCA significantly relaxed restrictions on entry into the motor carrier industry. 49 U.S.C. 10922. In response to those developments, the Commission took steps to simplify and clarify its tariff filing rules. See 48 Fed. Reg. 31,265 (1983).

In revising its rules, the Commission recognized that the participation requirement continued to serve important objectives. Accordingly, while modifying many requirements, the ICC retained its longstanding void-for-nonparticipation policy. See *Revision of Tariff Regulations, All Carriers*, 1 I.C.C.2d 404, 434 (1984). As the Commission explained in *Wonderoast, Inc.—Transp. Systems International, Inc.*, 8 I.C.C.2d 272, 277-278 (1992), applied in *Lovett* v. *Wonderoast*, 145 B.R. 40 (Bankr. D. Minn. 1992), the rule ensures that a carrier is not bound by the rate actions of another (including revisions to the referenced tariff) unless the carrier has clearly authorized the other person to act on its behalf through a continuing agency relationship. The participation rule thus promotes the statutory requirement that individual motor "carriers are responsible ultimately for filing their own rates." 8 I.C.C.2d at 278.

3. This case concerns operation of the Commission's void-for-nonparticipation rule with respect to mileage rate tariffs. A mileage rate consists of two indispensable components: the rate per mile and the distances between shipping points. Those two components are multiplied together to obtain the proper charge for a shipment. 49 C.F.R. 1312.30; Pet. App. 7b. The carrier can modify a rate by changing either the rate per mile or the distance component of its mileage rate. Thus, both components must be present for a tariff to contain a "rate" that satisfies the carrier's obligation to file its rates with the Commission under 49 U.S.C. 10762(a)(1).

Carriers may establish the distance portion of their mileage rates in three ways: (1) listing the distances between all relevant locations in their tariff; (2) attaching a map to the tariff; or (3) referring to a separately filed distance guide tariff. 49 C.F.R. 1312.30(c)(1). If the carrier uses the third method, the choice of a distance guide affects the ultimate charge for a shipment, because mileage figures vary depending upon the guide used, and vary even from one edition to the next of the same guide. Because a distance guide is itself a tariff, when a carrier refers to a distance guide to establish its mileage rates, it must do so through formal participation. 49 C.F.R. 1312.27(e).

B. The Commission's Decision in *Jasper Wyman*

In 1991, the Commission was asked to review the application of the void-for-nonparticipation rule in the context of mileage rate tariffs. During the 1980s, Overland Express, Inc. (Overland), a motor carrier, had filed tariffs with the Commission that established the mileage component of its rates by referring to the Household Goods Carriers' Bureau (HGCB) Mileage Guide Tariff 100 for distances. In 1970 Overland had submitted a power of attorney to HGCB, but in 1982 Overland ceased to pay the fee required to participate in the HGCB Mileage Guide. At that point, Overland's participation in that guide lapsed and HGCB, by a tariff filing effective May 22, 1983, removed Overland from the list of carriers that participated in its Mileage Guide Tariff.

After Overland's bankruptcy, its trustee sought to collect undercharges from shippers based on the difference between the rates Overland had actually billed the shippers and the rates purportedly reflected in Overland's tariffs. Numerous shippers who were sued by the trustee petitioned the ICC for a declaratory order that Overland could not establish undercharge claims based on tariffs that incorporate distances from the HGCB Mileage Guide. They argued that, because Overland had failed to participate in that tariff as required by ICC regulations, its

mileage tariffs were void as a matter of law. The ICC opened a docket to consider that issue and, in view of its industry-wide importance, requested comments from the public. *Jasper Wyman & Sons, et al.—Petition for a Declaratory Order—Certain Rates and Practices of Overland Express, Inc.*, 8 I.C.C.2d 246 (1993), petition for review granted, *Overland Express, Inc.* v. *ICC*, 996 F.2d 356 (D.C. Cir. 1993), petition for cert. pending *sub nom. ICC* v. *Overland Express, Inc.*, No. 93-883 (filed Dec. 3, 1993).

After thorough consideration, the Commission determined that when a tariff refers to a distance guide to establish rates and the carrier has not participated in that guide, its tariff is "void as a matter of law" by virtue of 49 C.F.R. 1312.4(d) and cannot support a claim to collect undercharges. *Jasper Wyman*, 8 I.C.C.2d at 247-248, 263. The Commission explained that because the carrier in that case had failed to pay the participation fee to the distance guide's publisher and the publisher had cancelled the carrier's participation in that tariff by a public filing, the carrier's "mileage rate tariff ha[s] no method to compute mileage," is "incomplete," and "cannot lawfully support the freight charges sought to be assessed." *Id.* at 247-248. The Commission noted that carriers and the public have "constructive notice" of the cancellation of participation in a distance guide, *id.* at 254, and that, once the cancellation is published, the carrier's tariffs "cease[] to satisfy the fundamental purpose of tariffs; to disclose the freight charges due to the carrier." *Id.* at 258.

C. Judicial Review of *Jasper Wyman*

1. *The present case.* In 1984, Riss Internal Corporation, a now-defunct motor carrier, filed a mileage rate tariff with the Commission that contained a per-mile rate and that referred to the HGCB Mileage Guide 100 tariff for distances. Riss, however, failed to pay the required participation fee to HGCB. Accordingly, by a tariff filing

effective February 19, 1985, HGCB filed a supplement to its distance guide cancelling Riss's participation in Mileage Guide 100.[1] Pet. App. 5b, 7b-8b; J.A. 11-14, 25-27.

In November 1989, Riss filed a bankruptcy petition and became known as petitioner Security Services, Inc. Pet. App. 4b. Petitioner's auditors compared the invoices Riss had originally submitted to shippers with Riss's tariffs, concluded that Riss had apparently undercharged respondent for transportation services, and sought to collect those undercharges. *Id.* at 5b. When respondent refused to pay, petitioner filed suit in federal district court. *Id.* at 2b, 5b.

The district court granted summary judgment for respondent. Relying on the ICC's decision in *Jasper Wyman*, the district court concluded that Riss's failure to participate in the HGCB distance guide meant that it did not have an effective tariff on file with the ICC at the time of the disputed charges and therefore had no basis for collecting undercharges. Pet. App. 9a-10a, 15a; *id.* at 9b-10b.

The court of appeals affirmed. It stated that, applying the ICC's void-for-nonparticipation rule, 49 C.F.R. 1312.4 (d), "Riss's tariff was void when [respondent] made its shipments in 1986 through 1989 because any power of attorney [Riss] previously may have issued became ineffective in 1985, and a void tariff cannot support the

[1] As the court of appeals explained, "[a]gents filing governing separate tariffs, such as [HGCB], are required to provide a list of participating carriers, either within the tariff itself or in a separate participating carriers tariff. When it is necessary to amend this list due to e.g., the cancellation of a carrier's participation, such amendment is accomplished by issuing a supplement to the tariff in which the list appears, as [HGCB] did in this case." Pet. App. 8b-9b (citations omitted). HGCB's Supplement No. 17 to Tariff ICC HGB 101-B indicates that a "#" symbol "cancel[s] [a] carrier's participation." J.A. 24. Riss's name appears with a "#" next to it. J.A. 14.

undercharges Riss seeks."[2] Pet. App. 15b (citation omitted). The court then turned to petitioner's claim that the ICC's rule could not be applied according to its terms, because it violates the conditions established by *ICC* v. *American Trucking Ass'ns*, 467 U.S. 354 (1984), for the ICC to exercise discretionary power to reject an effective tariff retroactively. Pet. App. 15b-16b. In *American Trucking Ass'ns*, the Court held that the ICC may retroactively reject a tariff only when that action "further[s] a specific statutory mandate" and is "directly and closely tied to that mandate." 467 U.S. at 367.

The court concluded that, although Section 1312.4(d) does retroactively reject a tariff when a carrier fails to have an effective concurrence or power of attorney, that rule satisfies both prongs of the *American Trucking Ass'ns* test. First, the rule furthers the "specific statutory mandate" that empowers the Commission to determine the information that is required to be included in a tariff.[3] Pet. App. 18b-19b. Second, the rule is "directly and closely tied" to that mandate, because the rule "defines the essential elements of an effective tariff," and clearly states that failure to include those elements renders a tariff void. *Id.* at 19b-20b, quoting *Freightcor Services, Inc.* v. *Vitro Packaging, Inc.*, 969 F.2d 1563, 1571 (5th Cir. 1992), cert. denied, 113 S. Ct. 979 (1993). Accordingly, the court upheld the Commission's void-for-nonparticipation rule.

2. *The Eighth Circuit's ruling.* The Eighth Circuit took a different approach in upholding the validity of the

[2] The court rejected petitioner's contention that it had validly participated in the HGCB Mileage Guide, finding that HGCB's cancellation of Riss's participation rendered any power of attorney that Riss had previously given to HGCB ineffective. Pet. App. 11b-15b. Petitioner does not claim in this Court that it effectively participated in the HGCB Mileage Guide. Pet. Br. 9 n.4.

[3] Under 49 U.S.C. 10762(a)(1), "[t]he Commission may prescribe other information that motor common carriers shall include in their tariffs."

void-for-nonparticipation rule. In *Atlantis Express, Inc.* v. *Associated Wholesale Grocers, Inc.*, 989 F.2d 281 (1993), the Eighth Circuit held that the rule does not result in the retroactive rejection of a filed tariff. The court explained that "[i]n the absence of distances to accompany distance rates, there simply is no tariff on file, notwithstanding the ICC's acceptance and publication of the [per-mile] rates"; in other words, "[t]he [per-mile] rates are meaningless without the distances." *Id.* at 283. Because the carrier is required to establish an effectively filed tariff that fully discloses rates, the court held that the failure to participate in the distance guide defeated the carrier's undercharge claim.[4] *Id.* at 283-284; see *F.P. Corp.* v. *Twin Modal, Inc.*, 989 F.2d 285 (8th Cir. 1993), cert. denied, 114 S. Ct. 95 (1993).

3. *The D.C. Circuit's ruling.* The D.C. Circuit, however, set aside the Commission's *Jasper Wyman* decision. *Overland Express, Inc.* v. *ICC*, *supra*. The *Overland Express* court concluded that Section 1312.4(d) effects a retroactive rejection of a tariff, because, in the court's view, a tariff may be effective despite its procedural or substantive imperfections. 996 F.2d at 360. "A regulation that purports to make a tariff [contained in ICC files] 'void' or 'ineffective' if a carrier fails to follow a procedural rule" is thus subject to the *American Trucking Ass'ns* test. *Ibid.*

Applying the two-part *American Trucking Ass'ns* test, the court of appeals concluded that the void-for-nonparticipation rule does not advance a specific statutory mandate; it advances instead a regulatory policy of the Commission. 996 F.2d at 362. Even if the rule does further a statutory mandate, the court of appeals held, the "draconian remedy" of retroactive rejection is not "di-

[4] Because it held that the ICC's rule did not retroactively reject a tariff, the Eighth Circuit found it unnecessary to apply the *American Trucking Ass'ns* test. *Atlantis Express*, 989 F.2d at 283.

rectly and closely tied" to a statutory power, because less drastic remedies (such as damages) are available. *Ibid.*[5]

SUMMARY OF ARGUMENT

A. The filed rate doctrine serves to "render rates definite and certain" by establishing the filed rate as the rate that "governs the legal relationship between shipper and carrier." *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 126, 132 (1990). Under the filed rate doctrine, carriers must charge only the rates they have filed with the ICC.

Congress has directed the ICC to regulate and enforce the system of tariff-filing that underpins the filed rate doctrine. The Commission permits a carrier to adopt tariffs filed by others in lieu of submitting its own tariffs to the agency, provided the carrier formally participates in those other tariffs. That requirement ensures that each carrier fulfills its duty to set its own rates. When a carrier fails to participate in a referenced tariff in the specified way, the carrier has not adequately disclosed its rates. The carrier has thus failed to satisfy the threshold requirement of the filed rate doctrine: the establishment of its own rates on file with the Commission.

That principle applies to carriers that establish the distance portion of their mileage rates by reference to a separately filed distance guide. To have a filed rate, a carrier must be a participant in the distance guide. Carriers and shippers are bound by the filed tariff; there is nothing unusual about the participation rule that requires an exception to that principle. Under the filed rate doctrine, shipper, carriers, and the public are conclusively deemed to be on notice of the materials on file at the Commission. And a carrier may not collect undercharges based on partially filed rates, which is all that a carrier

[5] Two circuits have followed the holding of *Overland Express. Security Services, Inc.* v. *P-Y Transp. Inc.*, 3 F.3d 966 (6th Cir. 1993); *Brizendine* v. *Cotter & Co.*, 4 F.3d 457 (7th Cir. 1993).

has when it allows its participation in a distance guide to lapse.

The rule that a tariff is effectively on file despite procedural imperfections or substantive violations of the Act does not apply in this case. While minor stylistic deviations do not result in treating a tariff as if it were never filed, a violation of the participation rule is not a matter of style. It deprives the tariff of definite, certain, and adequately disclosed rates. Nor can this case be equated to one in which an unlawful rate is filed. In that situation, the Court has held that a shipper who paid the unlawful rate must show actual injury in order to recover overcharges from the carrier. But where, as here, the carrier affirmatively relies on its tariff to collect additional sums, the carrier cannot invoke the filed rate doctrine unless its rate is actually and effectively filed.

B. The Commission's void-for-nonparticipation rule does not result in the retroactive rejection of a tariff. When a carrier fails to establish or maintain participation in the referenced tariff, the rule describes the *prospective* consequences of that violation. Those consequences are readily apparent to the carrier and the public at the time that participation lapses. The rule does not reach back and invalidate applications of the tariff to times when the tariff was validly in force. The fact that the omission may not be noticed until later and the rule is not invoked until that point does not make its application retroactive. The operation of the rule is similar to the effect of an expiration date in a tariff. After its expiration date, a tariff is no longer in force, and cannot support lawful charges. The same is true of a tariff with a lapsed participation. The result in neither case, however, is accurately described as retroactive.

C. Even if the void-for-nonparticipation rule is treated as retroactive, it is valid under *ICC* v. *American Trucking Ass'ns*, 467 U.S. 354 (1984). The rule furthers the Commission's statutory mandate to determine the content and form of tariffs and to ensure adequate

disclosure of the rates available to shippers. The rule is also directly and closely tied to that mandate; it is necessary to provide incentives to carriers to maintain effective relationships with the publishers of referenced tariffs. In light of the ease with which carriers may comply with the rule and the important purposes it serves, the rule is a reasonable exercise of the Commission's discretion.

ARGUMENT

A CARRIER CANNOT COLLECT UNDERCHARGES BASED ON MILEAGE RATES THAT REFER TO A DISTANCE GUIDE IN WHICH THE CARRIER IS NOT A PARTICIPANT

A. The Filed Rate Doctrine Precludes The Collection Of Rates That Are Not Stated In A Tariff

1. A cornerstone of the Interstate Commerce Act is the requirement that shippers and carriers observe the filed rate. The Act specifies that carriers may provide transportation "only if the rate * * * is contained in a tariff that is in effect * * *." 49 U.S.C. 10761(a). The Act also requires carriers to "publish and file" tariffs "containing * * * rates" with the Commission. 49 U.S.C. 10762(a)(1). As this Court recently reaffirmed, under the filed rate doctrine created by those requirements, "[i]gnorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed." *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 127 (1990), quoting *Louisville & Nashville R.R.* v. *Maxwell*, 237 U.S. 94, 97 (1915); see *Arizona Grocery Co.* v. *Atchison, T.&S.F. Ry.*, 284 U.S. 370, 384 (1932) ("[T]he statute require[s] the filing and publishing of tariffs specifying the rates adopted by the carrier, and ma[kes] these the *legal* rates, that is, those which must be charged to all shippers alike."); *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156, 163 (1922) ("The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff.").

In order for a carrier to invoke the filed rate doctrine, the carrier must have filed a tariff with the Commission that adequately discloses its rates. Rates cannot be made "definite and certain," *Maislin*, 497 U.S. at 126, quoting *Arizona Grocery Co.* v. *Atchison, T.&S.F. Ry.*, 284 U.S. at 384, absent a tariff that permits the public to determinate what those rates are. As the Court has explained, if there is no tariff on file that sufficiently discloses rates, "it would be monumentally difficult to enforce the requirement that rates be reasonable and nondiscriminatory, . . . and virtually impossible for the public to assert its right to challenge the lawfulness of existing proposed rates." *Maislin*, 497 U.S. at 132, quoting *Regular Common Carrier Conference* v. *United States*, 793 F.2d 376, 379 (D.C. Cir. 1986). The task of "prescrib[ing] the form and manner of publishing, filing, and keeping tariffs open for public inspection" is expressly delegated to the Commission. 49 U.S.C. 10762(b)(1).

For more than 50 years the Commission has permitted carriers to adopt or incorporate rates or rate components contained in tariffs filed by an agent. Carriers choosing to file rates in that manner must formally participate in those other tariffs through a power of attorney. 49 C.F.R. 1312.27; 49 C.F.R. 1312.4(d). That participation requirement furthers the statutory mandate that each carrier is responsible for setting and filing its own rates. It also reflects basic principles of agency law, by ensuring that a carrier is not bound by the actions of another person unless the carrier has assented to the other's actions through a continuing agency relationship. See, *e.g.*, 1 Restatement (Second) of Agency §§ 15, 26 cmt. f, 118 (1958).

In this case, Riss attempted to establish its rates by setting its per-mile charges in its own tariff and by relying on a particular distance guide filed by HGCB to supply the mileages between origination and destination points. Absent certainty about those mileages, it would be im-

possible to determine Riss's rates. Proper participation was therefore indispensable for Riss to have established rates that are "definite and certain" and that meet the filed rate doctrine's threshold requirement of having rates on file with the Commission.[6]

Consideration of the process for establishing rates by participating in a tariff filed by an agent makes evident the need for proper participation. HGCB updates and revises each mileage guide periodically, to reflect new or different routings. Those revisions may produce changes in the distances (and, therefore, in the charges assessed to shippers). HGCB also publishes guides that compute distances by different techniques.[7] When HGCB publishes a revised guide, it notifies participating carriers of the proposed changes, prior to the effective date, so that those carriers may decide whether to use the new mileage guide (and adjust their per-mile rate components as necessary to avoid any unwanted rate changes) or to select a different mileage guide or another means of computing distances for their mileage rates. Without knowledge of what guide the carrier is authorized to incorporate, the

[6] The issue in this case differs from the issues in other recent motor carrier cases that this Court has considered. In *Maislin*, 497 U.S. at 129-131, there was no dispute about whether the carrier had effectively filed its rates in a tariff with the ICC; rather, the issue was whether the ICC had permissibly made it an unreasonable practice for a carrier to collect those rates after it had quoted and billed lower rates that the shipper reasonably believed would be embodied in filed tariffs. Similarly, in *Reiter* v. *Cooper*, 113 S. Ct. 1213, 1216 (1993), the issue was "whether, when a shipper defends against a motor common carrier's suit to collect tariff rates with the claim that the tariff rates were unreasonable, the court should proceed immediately to judgment on the carrier's complaint without waiting for the [Commission] to rule on the reasonableness issue."

[7] For example, Mileage Guide 100 provides distances between named points. HGCB's Zip Code Guide, by contrast, provides distances from the geographic center of each three-digit zip code territory (or combined territories).

ICC, shippers, and the public cannot accurately compute charges.[8]

A carrier that does not confirm its selection of a particular guide (by paying the appropriate participation fee and providing the required power of attorney) has not fulfilled its responsibility to determine its own rates. The tariff filings available to the public will reflect that abdication of responsibility. Tariff agents are required to list in their tariffs the names of the carriers participating in those tariffs. 49 C.F.R. 1312.10(a) and (b); 1312.13(c); 1312.25; 1312.27(e).[9] When a carrier's participation in the referenced tariff is cancelled, the list must be amended through a public filing to reflect that cancellation. 49 C.F.R. 1312.10(a) and (b)(2); 1312.17(b); 1312.25 (d); see Pet. App. 8b-9b. That requirement serves the statutory disclosure function, by enabling tariff users to identify the basis for determining rates. If a distance

[8] Consider, for example, three different mileage guides: HGCB Tariff ICC HGB 100-D, effective June 1, 1990 (1990 Mileage Guide 100); HGCB Tariff ICC HGB 100-E, effective April 12, 1993 (1993 Mileage Guide 100); and HGCB Tariff ICC HGB 105-C, effective December 3, 1990 (1990 Zip Code Guide). The impact of selecting a particular guide is illustrated by the different mileages for journeys originating in Washington, D.C., and terminating in the six destinations listed below:

Washington DC to:	1990 Mileage Guide 100	1993 Mileage Guide 100	1990 Zip Code Guide
Washington GA	537	540	548
Washington NC	261	261	235
Washington PA	237	239	230
Washington Ct Hse OH	412	410	393
Waterbury CT	313	312	318
Waterloo IA	954	962	954

[9] For example, 49 C.F.R. 1312.13(c) states that "[u]nless a separate participating carrier's tariff list is filed, a list of the participating carriers shall be provided." 49 C.F.R. 1312.25 sets forth the same requirement of a list if a separate participating carrier tariff is filed.

guide tariff indicates that a particular carrier is not a participant in that tariff, or if its participation has been cancelled, the public has notice that the purported measure of distances selected by that carrier is not a valid measure. The effect is similar to a carrier's reference to another tariff that has expired: the basic statutory requirement of publishing rates is not met because the tariffs on file do not produce a means of calculating a rate. Under those circumstances, the filed rate doctrine cannot support a collection action, because there is no "filed rate" published in an ICC tariff.[10]

2. The court of appeals in *Overland Express* expressed the view that it would be an "extraordinary step" for a shipper to check the distance guide to determine whether a carrier is properly participating in that guide, 996 F.2d at 360, and that it would therefore undermine the filed rate doctrine to apply the ICC's rule as written. *Id.* at 361. That view is unfounded. As a practical matter, there is no unusual difficulty in consulting the relevant pages of the distance guide to determine whether a particular carrier is a participant. A person who is interested in calculating the carrier's rates will have to turn to that

[10] Amicus Overland Express, Inc. argues (Br. 12-21) that the ICC's regulations, as revised in 1984, do not require carriers to participate in distance guides, and therefore do not carry the consequence that a tariff is void if the carrier does not execute a power of attorney or concurrence. See 49 C.F.R. 1312.4(d). That claim is contrary to the text of 49 C.F.R. 1312.27(e), which states that "[c]arriers participating in tariffs which refer to, and are governed by, separate tariffs * * * shall also participate in those governing separate tariffs." Moreover, it also conflicts with the ICC's interpretation of its regulations. See *Jasper Wyman*, 8 I.C.C.2d at 249-252 (indicating that a carrier using a separately filed distance guide must participate in that guide). An agency's interpretation of its regulations is entitled to "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); see *Stinson* v. *United States*, 113 S. Ct. 1913, 1919 (1993) (collecting cases). No such showing has been made here.

guide for information about mileages, and in this case the guide prominently warns that its use is restricted to carriers that are listed as participants in it.[11] Understanding that language requires no special familiarity with tariffs, and to the extent that reading the tariff requires knowledge of ICC rules, it is no different from any other tariff inquiry. "[T]here are commercial services providing up-to-the-minute details of the carrier's rate schedule" and those services can assist shippers in watching and interpreting the tariffs. *Maislin*, 497 U.S. at 131 n.12.

More fundamentally, as a legal matter, the court of appeals' rationale conflicts with a key aspect of the filed rate doctrine. "The shipper's knowledge of the lawful rate is conclusively presumed." *Kansas City Southern Ry.* v. *Carl*, 227 U.S. 639, 653 (1913); *Reiter* v. *Cooper*, 113 S. Ct. 1213, 1219 (1993) ("The filed rate doctrine embodies the principle that a shipper cannot avoid payment of the tariff rate by invoking common-law claims and defenses such as ignorance" of the filed rate.). In line with that principle, the public is charged with "constructive notice" of the delisting of a carrier as a participant. *Jasper Wyman*, 8 I.C.C.2d at 254. The filed rate doctrine has never required proof that it would be easy to read the filed tariff or to interpret its symbols and definitions. What it has required is disclosure of rates to a person who reviews the filed material. When a carrier's tariff is incomplete by virtue of its explicit failure to provide a distance component for its mileage charges, the carrier has not filed its rates. Under the filed rate doctrine, the carrier may

[11] The HGCB Mileage Guide states (J.A. 35):

> NOTE: THIS MILEAGE GUIDE MAY NOT BE EMPLOYED BY A CARRIER AS A GOVERNING PUBLICATION FOR THE PURPOSE OF DETERMINING TRANSPORTATION RATES BASED ON MILEAGE OR DISTANCE UNLESS CARRIER IS SHOWN AS A PARTICIPANT IN THE ABOVE NAMED TARIFF.

not rely on partially disclosed rates to collect undercharges.[12]

3. The failure to participate in the distance guide is not the sort of deficiency in tariff filing procedure that is overlooked in determining whether there is a "filed rate" under 49 U.S.C. 10761(a). It is true that this Court "long ago rejected the view that a tariff on file with the Commission and never rejected by it should be disregarded or treated as nonexistent merely because of some element of substantive unlawfulness in the rate, or some irregularity in the tariff filing formalities." *Genstar Chemical Ltd.* v. *ICC*, 665 F.2d 1304, 1308 (D.C. Cir. 1981) (citations omitted), cert. denied, 456 U.S. 905 (1982). But neither that principle nor the cases establishing it, *Berwind-White Coal Mining Co* v. *Chicago & Erie R.R.*, 235 U.S. 371 (1914), and *Davis* v. *Portland Seed Co.*, 264 U.S. 403 (1924), free a carrier from the baseline requirement of filing a tariff that establishes a rate.[13]

In *Berwind*, a carrier sought to collect demurrage charges, based on its filed tariffs, rules, and letter to the Commission setting forth its demurrage rates. The Court

[12] Petitioner argues (Br. 13) that the "net result" of the Commission's position is to permit "a secret rate agreement to control interstate transportation," thus subverting the filed rate doctrine. That is incorrect. The carrier has the obligation to file its rates, and when it has failed to do so, it cannot claim protection under the Act's policy to require fully disclosed (*i.e.*, filed) rates. By enforcing requirements designed to achieve adequate disclosure of rates, the *Jasper Wyman* approach supports, not undercuts, the filed rate doctrine.

[13] *Genstar* did not suggest otherwise. The court held that when a "shipper has been charged no more than the rate reflected in the tariff on file," its remedies are measured by any harm it suffered from the irregularity in the filing. 665 F.2d at 1308. The underlying principle is that a *shipper* may not recover damages based on irregular filings without establishing cognizable harm (for example, that the rates charged were unreasonable). That principle is fully compatible with a rule that a *carrier* may not recover alleged undercharges without first establishing that it has filed rates.

rejected the claim that those documents "were not sufficiently formal to comply with the law and hence afforded no ground for allowing demurrage." 235 U.S. at 375. It explained that "[t]he documents were received and placed on file by the Commission without any objection whatever as to their form and it is certain that as a matter of fact they were adequate to give notice." *Ibid.* *Berwind* does not hold that any defect in filing will be excused, as long as a document is sent to the Commission. The objections to the "form" of the tariff in *Berwind* went to stylistic matters such as the "size of the type in which the tariffs are to be printed." *Chicago & Erie R.R.* v. *Berwind-White Coal Mining Co.*, 171 Ill. App. 302, 307 (1912).[14] The shipper did not claim that the tariff lacked sufficient information to produce a rate, or that the tariff violated regulations governing the requirements for making a tariff effective. And, while it was "certain" in *Berwind* that the tariffs adequately provided notice, here, a shipper who diligently researched the tariffs would be unable to conclude that the reference to the distance guide was a valid means to set rates, because the guide itself challenged that reference.

In *Davis* v. *Portland Seed Co.*, the carrier's tariff charged less for a longer distance than for a shorter distance over the same route, in violation of former 49 U.S.C. 10726(c).[15] A shipper who was assessed the higher charge for the shorter haul sought reparations on the theory it should have been charged no more than the

[14] The Commission has similarly held that stylistic matters do not invalidate a tariff. See *Heavy and Specialized Carriers Tariff Bureau* v. *U.S.A.C. Transport, Inc.*, 302 I.C.C. 487, 488 (1957) (omission of symbol indicating change in rates does not invalidate tariff); *Atlantic Commission Co.* v. *Bangor & Aroostook R.R.*, 266 I.C.C. 651, 668 (1946) ("failure to symbolize" does not render tariff inapplicable).

[15] That provision was repealed in Pub. L. No. 96-448, Tit. II, § 220, 94 Stat. 1928 (1980).

lower, long-haul rate. 264 U.S. at 413-415. The Court held that, despite the substantive unlawfulness of the higher rate, the shipper could not treat it as a nullity. *Id.* at 424-425. To establish a right to reparations, the shipper had to show financial loss from application of the higher rate. *Id.* at 425.

Davis thus holds that the remedy for a substantively unlawful tariff rate is measured by the shipper's actual injury. The decision does not indicate that when a carrier has not established a filed rate at all, because of its failure to comply with Commission regulations governing disclosure of rates, the carrier is free to impose what it intended to be the tariff rate.[16] The tariffs of a carrier in the latter situation are "not merely 'technically deficient,' but, rather, lack[] effective provisions necessary to calculate freight charges." *Jasper Wyman*, 8 I.C.C.2d at 259. Whatever showing might be required for a shipper to recover damages as the result of the application of such a tariff, a carrier cannot rely on its incomplete tariff to assert undercharge claims.

B. The ICC's Void-For-Nonparticipation Rule Does Not Effect A Retroactive Rejection Of A Tariff

Petitioner contends that the ICC's void-for-nonparticipation rule declares tariff rates void retroactively, and that it therefore must satisfy the two-part test of *ICC* v. *American Trucking Ass'ns*, 467 U.S. 354 (1984). Pet. Br. 6, 9-10 & n.5. There is, however, nothing retroactive about the operation of the ICC's rule, and it is thus not subject to the *American Trucking Ass'ns* test.

1. The ICC's rule states that "a carrier may not participate in a tariff issued in the name of another carrier or an agent unless a power of attorney or concurrence has been executed," and that "[a]bsent effective concurrences or powers of attorney, tariffs are void as a matter of law." 49 C.F.R. 1312.4(d). The rule thus describes *prospective* consequences of a carrier's action. It is triggered when the carrier fails to enter or to renew appropriate arrangements with the tariff agent; its effect is revealed in the agent's public filing that cancels the carrier's participation. Neither the rule nor the public notice of cancellation requires specific ICC action, and neither has any effect on the carrier's rates prior to the effective date of the cancellation notice.[17]

The impact of the rule is therefore comparable to the effect of an expiration date in a tariff.[18] As of the expiration date, unless the carrier takes steps to extend it, 49 C.F.R. 1312.23(b), 1312.39(d), or to file a new tariff, the carrier is left with no effective tariff on file. The ICC does not cancel or reject the tariff at that time; nor is the tariff necessarily physically removed from the Commisson's files. Nevertheless, the expired rates become inap-

[16] See *Jasper Wyman*, 8 I.C.C.2d at 260; *Range Tariffs of All Motor Common Carriers—Show Cause Proceeding*, No. 40887 (ICC, served Aug. 4, 1993), slip op. 14 n.40 (distinguishing *Berwind*, *Davis*, and *Genstar* from the situation involved in *Jasper Wyman*, noting that in those cases, "[t]here [was] no Commission regulation stating that a tariff failing to comply with the disclosure requirements would be void as a matter of law, as there is in 49 CFR 1312.4(d) for tariffs which fail to meet the tariff participation requirements"); *Wonderoast, Inc.*, 8 I.C.C.2d at 276 (*Berwind*, *Davis*, and *Genstar* "addressed the question of irregularity in the *filed rate* and rejected such irregularity as a basis for nonapplication of the filed rate").

[17] A truly retroactive rejection would invalidate the tariff as to shipments made while the tariff was effective. For example, in this case, the court of appeals accepted "as true the inferences that an effective power of attorney existed from the time Riss issued ICC RISS 501-B in 1984 through HGB's cancellation of its participation in 1985." Pet. App. 16b. If the ICC's rule invalidated the tariff as to that period, it would have a retroactive effect. But that is not the case, for the rule has no impact on the tariff before issuance of the notice of cancellation. See *Jasper Wyman*, 8 I.C.C.2d at 258.

[18] The ICC's rules expressly authorize the filing of a tariff with a provision showing when the tariff will expire. 49 C.F.R. 1312.23(a).

plicable to shipments that occur after the expiration date. See *Constitution Stone Co.* v. *Baltimore & Ohio R.R.*, 231 I.C.C. 562 (1939) (published rate inapplicable when cancelled, even if erroneously); *Glidden Co.* v. *Chesapeake & Ohio Ry.*, 229 I.C.C. 599 (1938) (same). The same self-executing result occurs when a carrier's participation in a distance guide is cancelled, and the tariff contains no other means for computing rates.[19]

The ICC has long informed the industry of those features of the tariff system. In a release addressed to motor carriers in 1939, the Commission emphasized that when a carrier's participation in another tariff is cancelled, "[s]uch cancelation makes the use of rates in such tariffs by that carrier unlawful." 4 Fed. Reg. 4,440 (1939). The Commission added that "[i]t is likewise unlawful for common carriers to perform interstate transportation without lawful rates on file covering the services performed." *Ibid.* The Commission therefore reminded carriers of their obligation to arrange for the filing of an effective tariff upon cancellation of participation in an agency tariff. *Ibid.* The Commission did not characterize its rule as a retroactive remedy, but as a guideline for complying with the statutory filed rate requirements.[20] Such a provision is clearly valid as an exercise of Commission discretion under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). See *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 112 S. Ct. 1394, 1401 (1992).

2. The void-for-nonparticipation rule is thus quite different from the rule reviewed in *ICC* v. *American Truck-*

[19] When notice is given that a carrier's participation will be cancelled, it is easy for the tariff to be amended to restore a carrier's participation in a tariff and to ensure continuous applicability of the participation. 49 C.F.R. 1312.39(a) (permitting restoration of a carrier's participation on five days' notice).

[20] The relevant portion of the release is reprinted in the appendix to this brief. App., *infra*, 12a-13a.

ing Ass'ns. In that case, the Commission had announced a new remedy that would apply when carriers filed tariffs in substantial violation of rate-bureau agreements: the Commission would, in its discretion, retroactively reject the tariffs. 467 U.S. at 357-358. The explicit purpose of the Commission's remedy was to render "effective tariffs" that were found in its public files "void *ab initio*," so that shippers could bring actions to recover "over-charges" that had been made under the rejected tariffs. *Id.* at 355, 358, 367. The rule in *American Trucking Ass'ns* was retroactive for three reasons: it operated on tariffs that were valid on their face, it was expressly intended to alter those tariffs' past applications to shippers, and it depended for its enforcement on a later Commission determination that the carrier's violation existed and was serious.

None of those characteristics exists in this case. The void-for-nonparticipation rule defines the future consequences of a carrier's conduct, and it can be applied by reviewing the texts of the filed tariffs. The rule does not alter the charges applicable to past shipments; rather, it affects only shipments made after a carrier's participation in the distance guide is cancelled. Finally, the rule does not depend for its enforcement on a subsequent adjudication. Any person who consults the tariffs, and learns that a carrier had referred to a distance guide in which the carrier's participation was cancelled, understands that that tariff does not govern future shipments. That the violation may not be discovered until sometime after its occurrence does not make the rule retroactive. In short, the essential elements of a retroactive rejection are not present in this case.[21]

[21] There is no policy reason to treat the ICC's rule as a retroactive rejection of a tariff. A rule that permits the parties to arrange their conduct in the future and that declares the consequences of facts that are evident and available to all interested persons at the time of a transaction does not have the expectation-upsetting consequences of a retroactive rule. Thus, while it may be true that a

C. The ICC's Rule, If Viewed As Having Retroactive Effects, Is Valid Under This Court's *American Trucking Ass'ns* Test

Even on the assumption that the void-for-nonparticipation rule has the effect of retroactively rejecting a tariff, that consequence does not invalidate the rule. As the court of appeals found, the rule is permissible under *American Trucking Ass'ns*, because it promotes a specific mandate of the Act and is directly and closely tied to that mandate.

1. The void-for-nonparticipation rule "further[s] a specific statutory mandate of the Commission." *American Trucking Ass'ns*, 467 U.S. at 367. The ICC has an express mandate to determine the information that is required to be disclosed in a tariff. 49 U.S.C. 10762(a)(1) and (b)(2). That power is central to the attainment of a tariff filing system that adequately discloses rates and that restricts entry into secret arrangements between shippers and carriers. The ICC's rule in this case is a mechanism to ensure that tariffs reveal the applicable rates. By requiring "disclosure of the identity of the carriers participating in every tariff," the rule thus directly furthers the ICC's power to define the contents of tariffs. Pet. App. 19b, quoting *Freightcor*, 969 F.2d at 1571.

Petitioner contends that a statutory mandate contained in 49 U.S.C. 10762 itself cannot support retroactive rejection of a tariff under the *American Trucking Ass'ns* test. Br. 5-6, 10-14. According to petitioner, "Congress established 49 U.S.C. § 10762(e) to govern *all* rejections of tariffs established under rules promulgated pursuant to

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carrier could be exposed to overcharge claims for having assessed rates based on a tariff that is void under the ICC's rule, Pet. App. 18b, that does not mean that the rule accomplishes a retroactive rejection of a tariff (any more than would a rule exposing a carrier to potential overcharge claims for having billed shippers under an expired tariff).

§ 10762."[22] Br. 10. The power contained in Section 10762(e), however, does not exclude other exercises of authority to enforce the Act. The Act states that "[e]numeration of a power of the Commission in this subtitle does not exclude another power the Commission may have in carrying out this subtitle." 49 U.S.C. 10321(a). As the Court explained in *American Trucking Ass'ns*, the ICC is not limited to its express rejection powers, but may take additional action when it is "reasonable" and "direct[ly] adjunct" to its sources of authority; this latitude is necessary to ensure adequate implementation of Congress's goals with respect to specific problems the legislature may not have foreseen. 467 U.S. at 365.[23]

2. The void-for-nonparticipation rule is also "directly and closely tied" to that mandate. 467 U.S. at 367. The rule that carriers must participate in referenced tariffs would have little force if carriers were free to ignore it and yet treat their rates as properly filed. It is impractical to require the ICC to review every filed tariff to determine whether all cross-references are supported by par-

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[22] 49 U.S.C. 10762(e) states: "The Commission may reject a tariff submitted by a common carrier under this section if that carrier violates this section or regulation of the Commission carrying out this section." In *American Trucking Ass'ns*, the Court held that this provision authorizes the Commission to reject a tariff only when it is tendered for filing. 467 U.S. at 361-364.

[23] In *Overland Express*, the court of appeals suggested that the void-for-nonparticipation rule furthers only a "*regulatory* policy" that is not required by statute, and hence cannot satisfy the *American Trucking Ass'ns* test. 996 F.2d at 362. The ICC's participation requirement, however, furthers the role specifically assigned by Congress to the Commission of bringing uniformity and clarity to the tariff filing system. The Act states that the ICC "*shall* prescribe the form and manner of publishing, filing and keeping tariffs open." 49 U.S.C. 10762(b)(1) (emphasis added). Nothing in *American Trucking Ass'ns* precludes the Commission from crafting remedies for policies formulated under that congressional mandate, particularly when those policies support the "statutory objective[]," 467 U.S. at 366, of the filed rate doctrine itself.

ticipations. The task would be particularly daunting since participations may need to be renewed periodically or upon revision of the cited tariff, and a carrier's tariff that was in compliance when filed may later become deficient. The ICC's rule thus promotes carrier responsibility in the establishment of rates, by ensuring that carriers have an adequate incentive to keep their cross-references to other tariffs current and effective.[24]

Here, as in *American Trucking Ass'ns*, 467 U.S. at 370, "it is within the Commission's discretion to decide that the only feasible way to fulfill its mandate" is to regard a tariff as void when a cross-reference lapses. Damages actions that would seek to recover amounts by which shippers were injured by lapsed references are an inefficient and costly way to enforce the requirement of participation. The ICC would incur significant administrative burdens in adjudicating those cases, and would have no assurance that the potential for damages claims would give carriers sufficient incentive to comply. Moreover, the Commission has long indicated that the responsibility for complying with the participation requirement lies with carriers, see p. 22, *supra*, and the allocation of responsibility to carriers under the void-for-nonparticipation rule is consistent with that view.

Contrary to the suggestion of the *Overland Express* court, 996 F.2d at 362, the absence of hearing procedures under the void-for-nonparticipation rule is not a basis for invalidating it under *American Trucking Ass'ns*. The fact

[24] The ICC has for many years lacked the resources to conduct a "comprehensive examination program" of tariffs placed in its files. *American Trucking Ass'ns*, 467 U.S. at 360 n.4. The Commission receives more than 1 million motor carrier tariffs each year, see 1985 ICC Annual Report 114 (1,180,153 tariffs received); 1992 ICC Annual Report 113 (1,159,106 tariffs received), and cannot reasonably administer a program that would entail initial examination and periodic review of each document. A mechanism to place the burden of compliance on carriers is essential to make the system function.

that carriers can readily comply with the rule, and are on notice when they are out of compliance, see *Jasper Wyman*, 8 I.C.C.2d at 253-254, is a factor that supports its reasonableness. See *American Trucking Ass'ns*, 467 U.S. at 370-371 (noting that carriers that violate rate bureau agreements "will be aware of their transgressions" and that concerns that inadvertent violations will be penalized "are largely unfounded"). And, unlike the rule at issue in *American Trucking Ass'ns*, the rule here does not require the determination of facts that are unavailable from the Commission's public files, nor does it call for the exercise of Commission discretion. The automatic operation of the rule is thus consistent with its simplicity and with the ease of carrier compliance.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 1994

APPENDIX

The Interstate Commerce Act, Title 49, United States Code

§ 10761. Transportation prohibited without tariff

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title [49 U.S.C. § 10501 *et seq.*] shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter [49 U.S.C.S. § 10761 *et seq.*]. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

(b) The Commission may grant relief from subsection (a) of this section to contract carriers when relief is consistent with the public interest and the transportation policy of section 10101 of this title [49 U.S.C.S. § 10101]. The Commission may begin a proceeding under this subsection on application of a contract carrier or group of contract carriers and on its own initiative for a water contract carrier or group of water contract carriers.

* * * * *

§ 10762. General tariff requirements

(a)(1) A carrier providing transportation or service subject to the jurisdiction of the Interstate

Commerce Commission under chapter 105 of this title [49 U.S.C.S. § 10501 *et seq.*] (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this chapter for transportation or service it may provide under this subtitle. A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs. A motor contract carrier that serves only one shipper and has provided continuous transportation to that shipper for at least one year or a motor car~~rier of pro~~perty providing transportation under a certificate to which the provisions of Section 10922(b)(4)(E) of this title apply may file only its minimum rates unless the Commission finds that filing of actual rates is required in the public interest.

(2) Carriers that publish tariffs under paragraph (1) of this subsection shall keep them open for public inspection. A rate contained in a tariff filed by a household goods common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of chapter 105 [49 U.S.C.S. § 10521 *et seq.*, 10541 *et seq.*, or 10561 *et seq.*] shall be stated in money of the United States. A tariff filed by a motor or water contract carrier or by a freight forwarder providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of that chapter [49 U.S.C.S. § 10521 *et seq.*, 10541 *et seq.*,

or 10561 *et seq.*], respectively, may not become effective for 30 days after it is filed.

(b)(1) The Commission shall prescribe the form and manner of publishing, filing, and keeping tariffs open for public inspection under this section.

* * * * *

Regulations of the Interstate Commerce Commission, 49 C.F.R.

§ 1312.4 Filing tariffs.

* * * * *

(d) **Concurrences and powers of attorney.** Concurrences and powers of attorney shall not be filed with the Commission. However, a carrier may not participate in a tariff issued in the name of another carrier or an agent unless a power of attorney or concurrence has been executed. Absent effective concurrences or powers of attorney, tariffs are void as a matter of law. Should a challenge to a tariff be made on this basis, carriers will be required to submit the necessary proof. See also § 1312.10.

* * * * *

§ 1312.10 Powers of attorney, concurrences, transfer of agent. [See also § 1312.4(d)]

(a) **Powers of attorney.** Powers of attorney may be given by a carrier to a carrier or an agent for the purpose of publishing and filing tariffs. A power of attorney may be given by Class III rail carriers to larger carriers with which they connect or by rail subsidiaries to parent rail carriers authorizing the larger or parent rail carriers to publish tariffs, to give and receive concurrences, and to give powers of at-

torney to agents on behalf of the Class III or subsidiary rail carrier. The power may be as broad or limited as expressed in the document, and alternate agents may be named. Powers of attorney shall not be filed at the Commission, but shall be maintained and produced if requested by any person. Revocation or amendment of the power of attorney shall be reflected through lawfully published tariff revisions effective concurrently. In the event of failure to so revise the applicable tariff or tariffs, the rates in such tariff or tariffs will remain applicable until lawfully changed. If the scope of a power of attorney is questioned by any person, the document shall be produced.

(b) **Concurrences.** (1) A concurrence is used to show that one carrier has agreed to participate in joint rates or provisions published in a tariff filed by another carrier or agent. A concurrence does not give a carrier authority to publish local rates or provisions for the carrier issuing the concurrence. If two or more carriers execute powers of attorney to the same agent, it is not necessary for those carriers to exchange concurrences.

* * * * *

§ 1312.13 Contents of tariffs.

* * * * *

(c) **Participating carriers.** (1) (This paragraph does not apply to carriers' local tariffs.) Unless a separate participating carrier's tariff is filed, a list of the participating carriers shall be provided, showing the names of the carriers; the city and state of the principal office of the carrier; and the lead docket number of each carrier's operating authority, if any.

* * * * *

§ 1312.17 Amendments.

* * * * *

(b) **Lists of participating carriers.** (This paragraph does not apply to participating carrier tariffs.)

(1) In bound tariffs, the list shall be amended by—

(i) Publishing a complete new list containing all changes and canceling the prior lists; or

(ii) Publishing a cumulative list of all changes, alphabetically arranged either by code or carrier name, and the statement: "The list of participating carriers is as shown in the tariff except for the following changes." Only one cumulative list may be in effect at one time. A carrier's participation shall be cancelled by showing the carrier's complete name, together with the word "Cancel" or other suitable provision. Changes shall be carried forward in subsequent amendments to the list as reissued matter.

(2) In a looseleaf tariff, the list shall be amended either by (i) republication of the page(s) on which the list appears, indicating the cancellations, additions and changes. The canceled carriers' names shall be republished on a separate page(s) at the end of the list, indicating when the cancellation was first effective, until all provisions in the tariff referring specifically to the carrier(s) have been removed from the effective pages. The pages containing the list shall refer to the page(s) containing the list of canceled carriers; or (ii) reissuing the affected page(s) with an appropriate symbol to show elimination of a carrier.

(3) Concurrent with the cancellation of a carrier from the participating carrier list, all provisions specifically referring to that carrier shall be appropriately amended unless—

(i) the cancellation is in connection with the publication of a complete adoption of the rates of that carrier by another (see § 1312.20); or

(ii) The method permitted in paragraph (b)(4) of this section is used.

(4) A carrier's participation may be canceled by publishing a blanket cancellation notice directly with the list of participating carriers, and referring to the notice when canceling the carrier's name from the list. If this method is used, all provisions specifically referring to that carrier shall be amended as soon as possible. During the interim, an item or provision which specifically refers to that carrier may not be republished unless the reference is concurrently removed.

* * * * *

§ 1312.25 Participating carrier tariffs.

(a) **Separate tariffs may be filed by agents.** (1) An alphabetical list of carriers participating in agent's tariffs, along with a description of the underlying tariffs, may be filed in a separate tariff (not a rate tariff). The title page of the participating carrier tariff shall state that it applies only in connection with tariffs referring to it. If the tariff governs tariffs issued jointly by two or more agents, it shall be a joint issue (see § 1312.11).

(2) Except for statements explaining the extent of carriers' participation in governed tariffs (for example, only for local hauls or only for joint hauls) the tariff may not contain provisions governing rate application.

(b) **List of carriers.** (1) The list of participating carriers shall be constructed in the manner required

by this part. Carriers' code designations may be shown directly with the carriers' names.

(2) All governed tariffs in which a carrier participates shall be referred to by ICC designation directly with the carrier's name. The participation of all carrier's in the participating carrier tariff may be provided by a statement, rather than listing the tariff designation directly with the carriers' name.

(c) **List of tariffs.** An agent's participating carrier tariff shall contain a current and correct list of its tariffs, including those which contain their own list of participating carriers or which are issued jointly with another agent(s). If the participating carrier tariff is a joint issue, only the tariffs of the principal agent need be listed. The tariffs shall be listed in numerical order by ICC designation, with a separate section for each agent if joint issues are involved. Each tariff listed shall be described so that its general application may be determined without examining the tariff itself.

(d) **Cancellation of participating carriers.** (1) Except as provided in paragraph (f) of this section, when a carrier's participation in a participating carrier tariff or governed tariff is canceled, all reference to the carrier in the involved tariff(s) shall be canceled.

(2) The cancellation may be accomplished either by—

(i) Amending all matter to eliminate reference to the carrier; or

(ii) Publishing a blanket cancellation notice.

The blanket cancellation shall be published in the participating carrier tariff and shall be referred to

in the cancellation of the carrier's name. A provision referring to the canceled carrier may not be republished without concurrent cancellation of the reference to that carrier and all matter shall be amended as soon as possible.

(3) (i) In a bound tariff the canceled carrier's name (and reference to the blanket cancellation notice, if used) shall be carried forward as reissued matter in the list of participating carriers.

(ii) In a looseleaf tariff, the carrier's name (and reference to the blanket cancellation notice, if used) and the date the cancellation became effective shall be republished in successive issues of the list of participating carriers until all provisions referring to the carrier are amended.

(e) **Reinstatement of participating carriers.** If a carrier's participation is canceled, and reinstated at a later date, the tariff shall so explain. This explanation shall be referred to directly with the reinstated carrier's name until the participating carrier tariff is reissued.

* * * * *

§ 1312.27 Classification, exceptions, rules, dangerous articles and station tariffs.

* * * * *

(e) **Participation in governing publications.** Carriers participating in tariffs which refer to, and are governed by, separate tariffs (classifications, exceptions, rules etc.), shall also participate in those governing separate tariffs, unless specifically stated in the governed tariffs that provisions in the separate tariffs will not apply for their account. This does

not require participation in local drayage tariffs or in terminal and special services tariffs applicable only for the issuing carrier. Carriers participating in a rate tariff solely to provide substituted service at another carrier's option need not participate in the governing tariffs. See § 1312.38.

* * * * *

§ 1312.30 Distance rates.

(a) **Distance rates may be filed.** Distance of mileage (hereafter referred to as distance) class or commodity rates may be filed.

(b) **Method of showing distances.** Distance rates may be published to apply per vehicle per mile, or other unit per mile, or by establishing a rate table or segment showing a scale of distances for which charges will be applied. If the latter method is used, a rate shall be provided for each distance. Each State or area covered by the application of the rates shall be listed. The listing may be brief but informative as to the territorial coverage.

(c) **Determination of Distances.** (1) A tariff containing distances rates shall contain provisions for the determination of distances by—

(i) Publishing the distances between all locations covered by the distance rates in the tariff;

(ii) Referring to a map(s) attached to the tariff; or

(iii) Referring to a distance guide(s).

(2) If maps are referred to, the rate tariff shall include a rule specifying the manner in which distances are obtained from maps. The rule shall in-

clude a definite means for determining distances between all locations within the territorial coverage of the rates, regardless of whether or not all the locations are shown on the map and regardless of whether or not actual distances are shown between all locations.

(3) When a map to a tariff is superseded by another, the new map shall be attached to and made a part of a supplement to a bound tariff, or a looseleaf page to a looseleaf tariff, which shall specifically cancel the old map and give effect to the new.

(4) Except as provided in § 1312.13(e)(2), only distance guides officially on file with the Commission may be referred to. More than one may be referred to provided the rate tariff clearly specifies the circumstances under which each guide will apply. An agent's tariff may refer to another agent's distance guide.

(5) Distance guides shall provide distance tables or combinations of tables and maps. Tables shall provide specific distances between a substantial number of the points and be shown as having precedence over the distances determined by the use of maps. Each guide shall provide rules stating its application. The rules shall include a means for determining distances between all locations with the territorial coverage of the guide, regardless of whether all the locations are shown in the guide or whether distances are shown between all locations. It distances between certain points or areas are to be determined only through a certain gateway or interchange point, those points or areas and the gateway or interchange point shall be identified. Distance guides filed in "paper" format may exceed the maximum size limitations imposed by § 1312.3 but may not exceed

14½ by 17½ inches in size. Carriers may file automated distance determination systems which are linked by reference in abbreviated distance guides or rate tariffs to computer stored information provided the following conditions are met:

(i) Carriers or their tariff publishing agents shall make arrangements with the Commission for the receipt, storage and use of the systems through existing Commission technology and facilities.

(ii) In the event that a system is not compatible with Commission technology, the necessary implementing equipment and programs shall be placed on file with the Commission for use by Commission personnel and the public at no cost.

(iii) Proposed changes in the systems shall be given notice and reflect the nature of the change, as required by 49 U.S.C. § 10762(c)(3) and § 1312.4(e) and § 1312.17(f). However, if an electronic distance determination system is not inherently capable of giving notice and symbolization of changes within the program, then printed tariff amendments to the distance guides or rate tariffs will be required. The amendments shall show the currently effective provisions as well as the proposed changes thereto.

(iv) The distance guides or rates tariffs shall provide all the information necessary to access and utilize the systems.

4 Feg. Reg. 4,440 (1939)

INTERSTATE COMMERCE COMMISSION

Cancellation of Participation in Agency Tariffs

October 30, 1939

To All Motor Carriers Subject to Section 217 of the Motor Carrier Act, 1935:

So many tariff complications and possibly unwitting violations of the law result from the cancelation of the participation of motor carriers in agency tariffs, including classification publications, that it is necessary to call the attention of all interstate common carriers by motor vehicle and their publishing agents to their obligations in this respect.

The law requires that all common carriers shall file with the Commission, and keep open to public inspection tariffs containing all their rates, fares, and charges for transportation and all services in connection therewith. Many carriers have complied with this obligation by participating in agency tariffs filed by agents who act in accordance with the by-laws of bureaus, conferences, or other organizations of motor carriers. Upon failure of a carrier to pay the established dues of such organization, or to comply with the by-laws, in many instances the agent proceeds to cancel the carrier's participation in the agency issues. Such cancelation makes the use of rates in such tariffs by that carrier unlawful. It is likewise unlawful for common carriers to perform in interstate transportation without lawful rates on file covering the services performed. Therefore, the carrier must ar-

range to establish, effective on the same date that its participation in the agency issue is canceled, rates for the transportation services which it may lawfully perform and for which it does not otherwise have rates filed.

An individual carrier may publish its own tariffs to take the place of those formerly published by its agent, or it may arrange to have its rates published by another agent, or republished by the agent who canceled them.

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No. 93-284

In The

Supreme Court of the United States

October Term, 1993

SECURITY SERVICES, INC. f/k/a RISS INTERNATIONAL CORPORATION,

Petitioner,

v.

K-MART CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF OVERLAND EXPRESS, INC., AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF OVERLAND EXPRESS, INC., AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Overland Express, Inc. respectfully files this brief as an amicus curiae in support of Petitioner. Written consent has been obtained from counsel for Petitioner and from counsel for Respondent for filing of this brief pursuant to Supreme Court Rule 37. The letters reflecting consent have been filed with the clerk's office.

INTEREST OF AMICUS CURIAE

Prior to filing bankruptcy in 1988, Overland Express, Inc. (hereinafter "Overland" or "Amicus") operated as an interstate motor carrier licensed by the Interstate Commerce Commission (hereinafter "ICC" or "Commission"). Shortly after its bankruptcy, Overland engaged an audit company to review its freight bills and payment records to determine whether shippers served pursuant to Overland's common carrier authority had properly paid in accordance with Overland's filed tariffs. When it was discovered that many shippers had not properly paid Overland's filed rate charges, Overland rebilled these shippers for the full charges. When a shipper failed to pay after rebilling, suit was instituted to collect the charges.

In January, 1991, Jasper Wyman & Sons and thirty other shippers who had been sued by Overland (hereinafter referred to as "ICC Petitioners") filed a Petition for Declaratory Order with the ICC. The Declaratory Order sought determination of the validity of Overland's mileage based rates. ICC Petitioners claimed that Overland had improperly utilized the Household Goods Carriers' Bureau ("HGCB") Mileage Guides to determine mileages for use in Overland's filed tariffs. ICC Petitioners asserted that this irregularity "voided" Overland's tariffs, and thus Overland could not pursue motor carrier undercharges against them. *See Jasper Wyman & Son, et al. – Petition for Declaratory Order – Certain Rates and Practices of Overland Express, Inc.*, 8 I.C.C.2d 246, 247 (1992) (hereinafter *"Jasper Wyman"*), *rev'd sub nom. Overland Express, Inc. v. Interstate Commerce Comm'n*, 996 F.2d 356 (D.C. Cir. 1993) (hereinafter *"Overland"*).

Because of the industry-wide importance of the issue presented, the ICC published a notice in the *Federal Register* seeking comments from "interested persons, including any party to a case involving this issue pending before the Commission or in court." 56 Fed. Reg. 24,091 (1991). After receiving comments from the public, the ICC issued its final order on January 30, 1992. In *Jasper Wyman* the ICC first announced its "void-for-nonparticipation" policy in which it claimed that a carrier's tariff which referred to a distance guide without the carrier "participating" in that tariff was void *ab initio*. 8 I.C.C.2d at 247-48. Overland timely appealed the ICC's decision to the D.C. Circuit arguing that the void-for-nonparticipation policy announced in *Jasper Wyman* was in effect an illegal, retroactive tariff rejection which violated this Court's decision in *Interstate Commerce Comm'n v. American Trucking Assocs., Inc.*, 467 U.S. 354, *reh'g denied*, 468 U.S. 1224 (1984) (hereinafter *"ATA"*). The D.C. Circuit agreed and granted Overland's petition for review. *Overland*, 996 F.2d at 362.

Prior to the D.C. Circuit's opinion, the Third, Fifth and Eighth Circuits had adopted the ICC's void-for-nonparticipation rationale. *See Security Services, Inc. v. K-Mart Corp.*, 996 F.2d 1516 (3rd Cir.), *cert. granted*, 114 S. Ct. 341 (1993); *Freightcor Services, Inc. v. Vitro Packaging, Inc.*, 969 F.2d 1563 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 979 (1993); *F.P. Corp. v. Twin Modal, Inc.*, 989 F.2d 285 (8th Cir.), *cert. denied*, 114 S. Ct. 95 (1993). Subsequent to the *Overland* decision, the Sixth and Seventh Circuits have concurred with the D.C. Circuit. *See Security Services, Inc. v. P-Y Transp., Inc.*, 3 F.3d 966 (6th Cir. 1993); *Brizendine v. Cotter & Co.*, 4 F.3d 457 (7th Cir. 1993).

Amicus has a direct interest in the outcome of this case because of its impact on the D.C. Circuit's *Overland* decision. In providing the Court with the relevant portions of the ICC record not contained in the *K-Mart* record below, Amicus also fulfills one of the primary purposes of an amicus filing. *See,* Supreme Court Rule 37.1.

SUMMARY OF THE ARGUMENT

In the *ATA* decision, this Court established the standard for the ICC's ability to reject tariffs. In essence, the ICC has the authority to reject tariffs at the time of filing, and also has the ability to cancel the prospective effects of tariffs, yet its power to retroactively reject a tariff is severely limited. *ATA*, 467 U.S. at 361-64. Thus, under the *ATA* standard, the ICC's use of its void-for-nonparticipation policy must "further a specific statutory mandate" and be "directly and closely tied to the statutory mandate." *ATA*, 467 U.S. at 367. The Third Circuit and the D.C. Circuit agree that in the *Jasper Wyman* decision, the ICC has effected a retroactive tariff rejection. *See, e.g., K-Mart*, 996 F.2d at 1524-25, *Overland*, 996 F.2d at 359-60. It is however, in the application of the *ATA* standard that the D.C. Circuit and the Third Circuit diverge – the Third Circuit finding that the ICC's actions in the *Jasper Wyman* decision met the *ATA* standard and the D.C. Circuit finding they did not. *See, e.g., K-Mart*, 996 F.2d at 1526, *Overland*, 996 F.2d at 362. As correctly noted by the D.C. Circuit, the ICC's "regulatory policy" of tariff rejection in this instance was not "driven by a specific statutory mandate." *Overland*, 996 F.2d at 362. In addition, the ICC had failed to follow the directives of *ATA* in that it had

not attempted to formulate a "less draconian" remedy for failure to participate in the Mileage Guide than the complete abrogation of the carrier's tariff.

The D.C. Circuit had before it a fully developed record, including the regulatory record before the ICC when it considered the *Jasper Wyman* decision. Amicus has excerpted relevant portions of that record in the appendix hereto, to assist the Court in its review of the *K-Mart* decision. Amicus suggests that the D.C. Circuit therefore had a better basis for review of the ICC's actions and has reached the sounder result under the *ATA* standard.

ARGUMENT

I. PRIOR TO *JASPER WYMAN* THE ICC NEVER ENFORCED THE REGULATIONS WHICH FORM THE BASIS OF ITS VOID-FOR-NONPARTICIPATION POLICY

As a motor common carrier operating in interstate commerce pursuant to authority granted by the ICC, Overland had filed tariffs with the Commission. Overland's tariffs established charges for transportation of freight based on a "per mile" rate. To determine the specific mileage between any two points, the tariff "referred" to the HGCB Mileage Guide (hereinafter "Mileage Guide").[1]

[1] The ICC's regulations establish three methods of computing mileages for motor common carrier tariffs based upon distances. *See,* 49 C.F.R. § 1312.30(c). Carriers can compute distances by (i)

Overland had issued a power of attorney to the HGCB in 1970, however, the HGCB unilaterally cancelled Overland's participation in the Mileage Guide because Overland had failed to pay the yearly administrative fee.[2] Nevertheless, Overland continued to file with the ICC mileage-based rates in tariffs denominated ICC OVLA 200, 200A, 202, 202A, 203 and 203A. These tariffs specifically referenced Mileage Guide 100 issued by the HGCB. The ICC accepted all of these tariff filings without objection despite the fact that after May 22, 1983, Overland's participation in the Mileage Guide had been cancelled by the HGCB.

Overland, in its submissions to the ICC provided the following undisputed evidence:

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publishing a list of the distances between all locations covered by the distance rates, (ii) referring to an attached map, or (iii) referring to a distance guide. The regulations are silent as to any penalty should the carrier fail to utilize one of the three methodologies for determining distances.

In addition, 49 C.F.R. § 1312.27(e), requires carriers whose tariffs "refer to, and are governed by separate tariffs (classifications, exceptions, rules, etc.)" to "participate" in the tariff referred to. Distance guides are not specifically defined as tariffs in this or any other regulation.

Finally, 49 C.F.R. § 1312.4(d) sets forth the power of attorney requirement for carriers who "participate in a tariff issued in the name of another carrier or an agent." The regulation goes on to state, that, "absent effective concurrences or powers of attorney, tariffs are void as a matter of law."

[2] On May 22, 1983, Overland was deleted from the list of participating carriers. The HGCB removed Overland from "Participating Carrier and Scope Tariff" ICC HGB 101 via Supplement Number 72 to ICC HGB 101-A.

1. Since the tariff regulations were amended in 1984, the ICC had never rejected, or voided any distance rates filed by a motor common carrier with the Commission for failure to "participate" in a distance guide when reference to a distance guide was necessary to compute the carrier's rates. *See* Affidavit of Don Norman, App. 7-9.

2. During the months of April and May, 1991 (while the Commission was considering the *Jasper Wyman* petition), the Commission accepted tariffs from more than 230 carriers which referred to the HGCB Mileage Guide as a methodology for determining distances, without those carriers having been listed by the HGCB as "participating" carriers. *See* Affidavit of Don Norman, App. 8, 17-24.

3. From 1984 until 1988, approximately 15,000 carriers, or 40% of all common carriers who filed tariffs containing mileage rates, referred to the HGCB Mileage Guide without participating in the same. App. 9.

4. The Commission also routinely accepted and continued to accept other improper (i.e., not authorized by 49 C.F.R. § 1312.30(c)) methodologies for determining distance and prior to *Jasper Wyman* had never rejected a tariff for failure to properly state the appropriate distance methodology. App. 9-12.

5. ICC records revealed that in 1990 and 1991 its Section of Enforcement conducted audits of several trucking companies to determine whether they had issued powers of attorney or otherwise participated in the Mileage Guide. The audits also discussed the results of "voiding" the carriers' mileage based rates for failure to

"participate" in the Mileage Guide. The Commission was informed by its Section of Enforcement that if distance rates were to be considered void because of non-participation, higher rates would have to be charged to shippers. The ICC did nothing to inform any of the carriers involved that their tariffs in any way were deficient and that they should, as required by law, rebill the non-distance based higher rates. App. 25-38.[3]

Based upon the foregoing, Overland argued to the ICC that the Commission had condoned, if not encouraged, motor common carriers to file "defective" distance-based rates which refer to the HGCB Mileage Guide without the carriers actually participating in the guide. The ICC never accepted responsibility for allowing carriers to ignore its tariff regulations. Nor did the ICC agree with Overland that its regulations did not require participation in a distance guide. Instead, when presented with the undercharge claims filed by Overland, as well as other carriers, the ICC crafted an ingenious use of its tariff regulations to defeat those claims. The ICC used three particular regulations in such a fashion so as to almost "magically" cause filed rates, never rejected by the ICC, to disappear so that they could not be used by

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[3] The appendix hereto includes portions of the ICC's enforcement files obtained by FOIA requests. While the entire contents of each relevant enforcement file were made a part of the *Jasper Wyman* record, Amicus has included only one "Table of Rate Referrals" for each carrier. For example, in connection with an investigation of Bar Enterprises, the ICC provided 53 exhibits (Tables of Rates Referrals). *See* App. 25-26. For simplicity, Amicus has provided the Court with only one Table for each carrier. *See, e.g.*, App. 27-33, 35, and 38.

Overland or other similarly situated carriers to collect filed rate charges.

Although Overland's rates remained "on file" with the ICC, in order to prevent any filed rate undercharge claims, the Commission considered Overland's filed rates to be not "*effectively* on file" with the ICC after May 23, 1983. *Jasper Wyman*, 8 I.C.C.2d at 256 (emphasis added). That is, Overland had filed rates, just not "effective" filed rates. Of course, if shippers and competing carriers were to go to the ICC's tariff library and request Overland's tariffs, they would have no notice that the filed rates were "ineffective." The ICC admits that it has not been policing the tariff filing system for faulty tariffs, and yet somehow expects the public, including Overland, to engage in a "treasure hunt" to determine which are effective and which are not effective tariffs. This is bureaucratic nonsense and runs contrary to the statutory scheme which anticipates the ICC rejecting tariffs which "[violate] this section or regulation of the Commission carrying out this section" 49 U.S.C. § 10762(e).

Rather than police the tariff filings as required by Congress, the Commission fabricated a self-serving requirement that filed tariffs must comply with its regulations to be "effective." However, there is nothing within the statutory scheme which would allow the ICC to earmark as "ineffective" a tariff filing which had been received, placed on file by the agency and never rejected by the Commission. See 49 U.S.C. § 10762. The only remedy available to the ICC is its power of rejection pursuant to 49 U.S.C. § 10762(e). The ICC's duty to reject defective tariffs is critical if the public is to be informed as to which rates are on file and which are not. The ICC

in creating a legal fiction of filed, but "ineffective" tariffs, has gone way beyond its statutory authority and would make a mockery of the filed tariff system. Similar attempts to treat filed, but defective tariffs as legal nullities have been soundly rejected by this Court in *Davis v. Portland Seed Co.*, 264 U.S. 403 (1924); *Berwind-White Coal Mining Co. v. Chicago and Erie Railroad Co.*, 235 U.S. 371 (1914), and the D.C. Circuit in *Genstar Chemical Ltd. v. ICC*, 665 F.2d 1304 (D.C. Cir. 1981).

II. IN ORDER TO ELIMINATE UNDERCHARGE CLAIMS, THE ICC, IN *JASPER WYMAN*, HAS ONCE AGAIN IMPROPERLY ATTEMPTED TO INVALIDATE THE FILED RATE DOCTRINE

A. Introduction: The ICC's Negotiated Rates Policy

In 1980 Congress enacted the Motor Carrier Act[4] which reformed the Interstate Commerce Act, 49 U.S.C. §§ 10101, *et seq.* (hereinafter "Act" or "ICA"). The reforms generally relaxed the strict entry requirements in an effort to promote more competitive and economical transportation services. However, one central feature of the Act was retained without change – the requirement that motor common carriers publish their rates, rules and classifications in tariffs, file those tariffs with the ICC and strictly adhere thereto. *See* 49 U.S.C. §§ 10761 and 10762. *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 420 (1986). ("The duty to file rates with the Commission, see § 10762, and the obligation to charge only those

[4] Pub. L., 96-296, July 1, 1980, 94 Stat. 793.

rates, see § 10761, have always been considered essential to preventing price discrimination and stabilizing rates.").

In 1986 the ICC concluded that changes in the motor carrier industry warranted a tempering of the rule of strict adherence to the tariff rate. *NITL – Pet. to Inst. Rule on Negotiated Motor Car.*, 3 I.C.C.2d 99 (1986), (hereinafter *"Negotiated Rates I"*).Under this policy statement, the ICC invited references from the various courts in which actions for the collection of motor common carrier freight charges were pending so that it could determine whether the collection of undercharges would be an unreasonable practice.[5] This Court soundly rejected the ICC's new policy enunciated in *Negotiated Rates I and II. See Maislin Indus., Inc., U.S. v. Primary Steel, Inc.*, 497 U.S. 116 (1990). Thus, neither the ICC nor the transportation community may now assert the "unreasonable practices" defense to a motor common carrier's efforts to collect the rates published in its ICC-filed common carrier tariff. The Commission, however, in *Jasper Wyman* demonstrated its continued ingenuity in attempting to frustrate the requirements of the filed rate doctrine.[6]

[5] The ICC clarified its new policy in *NITL – Pet. To Inst. Rule on Negotiated Motor Car.*, 5 I.C.C.2d 623 (1989) (hereinafter *"Negotiated Rates II"*).

[6] The Commission's overzealous campaign against undercharges is most ironic in light of the widely held view that the Commission is generally to blame for the "crisis" in the first place. For example, in an article reviewing the history of freight undercharges, William P. Jackson, Jr. recounts a 1980 speech by an ICC Commissioner to the Southern Traffic League. The Commissioner instructed shippers to "pretend that the ICC doesn't

B. The Tariff Regulations Relied Upon By The ICC Do Not Provide The ICC With The Authority To Retroactively "Void" Overland's Filed Rates

1. The Tariff Regulations At Issue

By decision served October 1, 1984, in No. 37321 *Revision of Tariff Regulations, All Carriers*, 1 I.C.C.2d 404 (1984) (*"Revision of Tariff Regulations"*), the ICC revised its tariff publishing rules which govern the tariffs at issue in this proceedings.[7] The stated purposes of these new rules were to: (1) consolidate existing rules and regulations so that only one set of rules applies to all carriers; (2) modify procedural rules "to insure that they do not conflict with substantive law and policy;" and (3) ensure that the tariff rules "are flexible enough to encourage innovation as well as tariff simplification efforts." 1 I.C.C.2d at 404.

The Commission stated further: "Moreover, we hope that such rules and regulations as we do retain are flexible enough to encourage carriers to continue to be innovative and competitive in designing tariffs that are simpler and easier for shippers to employ." *Id.* Thus, 49 C.F.R. § 1312.1(c)(3) provides: "These regulations are to

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exist, and do what you want to." As noted by Mr. Jackson, this comment "excited much disbelief on the part of the attendees." Jackson, *The Supreme Court Speaks Again on Freight Rate Undercharge Issues*, 61 Transportation Practitioners Journal 51, 53, n. 11 (Fall 1993).

[7] The former tariff regulations in effect prior to 1984 were found in 49 C.F.R. Part 1310. Although former §1310.1(f) required *filing* of powers of attorney and revocations at the Commission, it *did not* void filed rates for failure to comply with the power of attorney requirements.

be *liberally construed*. The *absence of specific approval of particular practices or provisions does not imply disapproval of them*". (emphasis added).

The new tariff rules in Part 1312 replaced the motor common carrier tariff rules formerly found at 49 C.F.R. Part 1310. It is those rules that were characterized by the Commission in *Revision of Tariff Regulations* as "inhibiting" tariff simplification because "there is no reason for this Commission to require that prices and services be presented in tariffs in any particular manner." 1 I.C.C.2d at 405. Moreover, the Commission stated that in amending the prior regulations, it desired to "eliminate" all of the tariff rules and regulations "that have been rendered obsolete by the marketplace or are no longer appropriate under the law, and to retain only those rules that are truly necessary to carry out the statutory disclosure function of tariffs." 1 I.C.C.2d at 405.

In sum, the rules contained in Part 1312 were to be less stringent, more flexible, simpler, and more encouraging of innovations or competition, than the stricter rules contained in Part 1310. In *Jasper Wyman*, however, the ICC reads the provisions in Part 1312 so narrowly and strictly as to produce a result that is significantly harsher.

For example, consider the following regulations in Part 1310.

49 C.F.R. § 1310.1(f) – *Concurrences and powers of attorney required.*

> Any participation by a carrier in a tariff publication other than its own issue must be supported by a power of attorney or concurrence, whichever is appropriate (see § 1310.27 (rule 27)). If it

is not already on file with the Commission, it must accompany the publication being filed.

49 C.F.R. § 1310.16(e) – *When a distance guide is referred to.*

(1) Only distance guides officially on file with the Commission may be referred to. More than one may be referred to provided the rate tariff clearly specifies the circumstances under which each guide will apply. All carriers parties to distance rates referring to one or more distance guides must also be parties to each guide referred to. An agent may refer to a distance guide published in the name of another agent for the account of participating carriers also parties to the guide.

Compare those provisions with the replacement regulations now codified in Part 1312.

49 C.F.R. § 1312.4(d). *Concurrences and powers of attorney.*

Concurrences and powers of attorney shall not be filed with the Commission. However, a carrier may not participate in a tariff issued in the name of another carrier or agent unless a power of attorney or concurrence has been executed. Absent effective concurrences or powers of attorney, tariffs are void as a matter of law. Should a challenge to a tariff be made on this basis, carriers will be required to submit the necessary proof.

49 C.F.R. § 1312.10 – *Powers of attorney, concurrences, transfer of agent.*

(a) *Powers of attorney* . . . Powers of attorney shall not be filed at the Commission, but shall be maintained and produced if requested by any person. Revocation or amendment of the power of attorney shall be reflected through

lawfully published tariff revisions effected concurrently. In the event of failure to so revise the applicable tariff or tariffs, the rates of such tariff or tariffs will remain applicable until lawfully changed. If the scope of the power of attorney is questioned by any person, the document shall be produced.

49 C.F.R. § 1312.30(c) – *Determination of distances.*

(1) A tariff containing distance rates shall contain provisions for the determination of distances by –

(i) Publishing the distances between all locations covered by the distance rates in the tariff;

(ii) Referring to a map(s) attached to the tariff; or

(iii) Referring to a distance guide(s).

* * *

(4) Except as provided in Section 1312.13(e)(2), only distance guides officially on file with the Commission may be referred to. More than one may be referred to provided the rate tariff clearly specifies the circumstances under which each guide will apply. An agent's tariff may refer to another agent's distance guide.

In reviewing the above-cited sections of Part 1312 and Part 1310, the following becomes readily apparent. First, the ICC in Part 1312 clearly removed the requirement that carriers file their powers of attorney with the Commission. Instead, the ICC added the penalty of voiding of the tariff in the event that a power of attorney was

not properly on file with the carrier and/or agent publishing a tariff in which a carrier desired to participate. In effect, the Commission put the entire burden of enforcement upon the carriers to ensure the execution of powers of attorney by threatening to void their tariffs should they fail to do so.[8]

The regulations governing distance rates themselves, however, do not clearly call for the use of powers of attorney and/or the requirement that carriers "participate" in distance guides. Rather, the ICC specifically removed *any requirement* that carriers "be parties to" distance guides referred to when it promulgated 49 C.F.R. § 1312.30(c)(1)(iii) and (4). Thus, the ICC in *Jasper Wyman* uses disparate parts of its regulations to effect a desired result – the elimination of undercharges.

The comments in *Revision of Tariff Regulations*, "Section 1312.31 DISTANCE RATES" demonstrate that the ICC eliminated the requirement that carriers participate in any referenced mileage guide:

> No comments were received regarding this section and the adopted rule is substantially the same as that shown in our proposed rules. Due to issues of copyright and general availability, *we will not mandate, for distance guides, who must*

[8] It is highly questionable, however, whether the Commission has any right to abrogate its statutory responsibility to ensure that carriers file their tariffs, and as a necessary part thereof, their powers of attorney and concurrences by simply threatening to void rates for failure to do so. Thus, the voiding provision of 49 C.F.R. § 1312.4(d) exceeds the ICC's statutory authority to promulgate tariff regulations under 49 U.S.C. § 10762(b).

> *be parties* or I.C.C. filing of the publication.

1 I.C.C.2d at 425 (emphasis added).

That the new voiding provision was not intended to be used to retroactively cancel filed rates is demonstrated by the ICC's own failure to enforce the regulations in this manner against operating carriers despite its knowledge of their transgressions. *See* App. 25-38 and Affidavit of Don Norman, App. 7-9.

2. The Revised Regulations Eliminated The Participation Requirement For Distance Guides

There is simply no nexus between 49 C.F.R. § 1312.4(d) and 49 C.F.R. § 1312.30(c) which would justify the voiding of mileage rates. The nexus is lacking because there is no requirement that carriers *participate* in distance guides *referred* to in their tariffs. This lack of a nexus is revealed by comparing the proposed rule for 49 C.F.R. § 1312.30(c)(4) with the rule as adopted. The *proposed rule* reads as follows:

> (4) . . . Only distance guides officially on file with the Commission may be referred to. More than one may be referred to provided the rate tariff clearly specifies the circumstances under which each guide will apply. An agent's tariff may refer to another agent's distance guide. *All carrier parties to distance rates referring to one or more distance guides shall be parties to each distance guide referred to.* (emphasis added).

The final rule specifically *removed* the last sentence, and therefore contained no *participation* requirement for

distance guides. According to the Official Comments, these changes were made due to "copyright issues" and the "general availability" of distance guides.[9]

[9] The HGCB Mileage Guide has become *the* standard reference book used by carriers and shippers in determining distances for mileage rates. Previously, there was a controversy concerning the use of copyrighted material contained in the distance guides published by the HGCB. *See Petition for Intervention and Reconsideration of Special Tariff Authority No. 82-1827 and Petition for Declaratory Order Concerning the Lawfulness of Copyrighted Tariffs*, No. 38886, unprinted decision (February 24, 1983) ("*Copyrighted Tariffs*").

In *Copyrighted Tariffs*, the ICC made a conscious decision not to get involved in the copyright issue. Recognizing that distance guides contained copyrighted material, the Commission eliminated any *requirement* that carriers be *participants* in distance guides. This position is consistent with the aforementioned purpose of the new tariff regulations of Part 1312 which was to "ensure that they do not conflict with substantive law and policy." However, should this Court accept Respondent's claim that the provisions of § 1312.4(d) can be used to mandate participation in the HGCB distance guides in order for mileage rates to be effective then the Official Comments, as well as the decision in *Copyrighted Tariff* become meaningless.

Whether or not Overland was a "participant" in the HGCB distance guides is thus irrelevant for the purposes of assuming the *validity* of Overland's tariffs. Rather, the only relevance participation has concerns any possible copyright infringement claim which could be made by the Household Goods Carriers' Bureau. *See* Goodman, *Commission Accelerates the Discharge of Motor Carrier Undercharges*, 60 Transportation Practitioners Journal 257, 258-60 (Spring 1993).

3. Participation In A Tariff Is Distinct From Reference To A Distance Guide And Is Treated Differently Under The Regulations

There is a clear distinction within the regulations themselves between "participation" and "reference". 49 C.F.R. § 1312.4(d) governs *participation* in joint tariffs; whereas 49 C.F.R. § 1312.30(c) governs *reference* to official distance guides. The difference between the plain English meaning[10] of these two words, as well as the difference between the context and regulatory intent of these two sections could not be more obvious. The concept of "joint rates," "joint tariffs" and the use of another agent to publish and file tariffs is consistent with "participation" and the use of powers of attorney and concurrences. Concerted or joint activity is what is involved in such cases. To *participate* in joint rates requires the execution of a power of attorney or concurrence.

On the other hand, the publication of tariffs based on the distances between two or more points requires some uniform means to determine the distances. Under the provisions of 49 C.F.R. § 1312.30(c), this may be accomplished by *reference* to a distance guide. The carrier, by referring to a distance guide in its tariff, holds out to the public that the mileages contained in the guide apply. The public has no interest or need to inquire as to whether the carrier has "participated" in the guide by paying a fee to the guide publisher. Thus, regardless of the fact that the

[10] To "participate" means to "take part," "to take part in" or "to share in". To "refer" means to "relate," "to direct attention usually by clear and specific mention." *Webster's Ninth New Collegiate Dictionary* (1984).

HGCB claims that "participation" is mandatory the regulations only require reference. As the Commission noted in *Copyrighted Tariffs*, as well as in other statements concerning the use of copyrighted material, the HGCB's "participation" requirement is a *private* copyright issue and has no bearing on the regulatory requirement for the use of distance guides. *See* Affidavit of Don Norman, App. 12-15.

In fact, a study of the regulatory history of the ICC's tariff participation requirements, led Leonard S. Goodman to conclude that tariff voiding was not even considered by the Commission at the time that the regulations were promulgated. *See*, Goodman, *Commission Accelerates the Discharge of Motor Carrier Undercharges*, 60 Transportation Practitioners Journal, 257, 258-60 (Spring 1993). Mr. Goodman noted:

> There was not the slightest hint in 1984 [when the regulation was revised] that the Commission might comb the filed concurrences and powers of attorney to determine whether carriers who referred to distance guides in fact participated in those guides. In fact, it had taken steps to disassociate itself from any such procedure. It had eliminated the requirement for filing all concurrences and powers of attorney, stating quite openly, "These documents are not used by us." (1 I.C.C.2d at 408).

60 Transp. Practitioners J. at 264.

Mr. Goodman concluded that in *Jasper Wyman*, the Commission had done an about face on the issue. He reached this conclusion by comparing the 1984 explanation to the ICC's interpretation of the regulation. In 1984,

the Commission noted that "due to issues of copyright and general availability, we will not mandate, for distance guides, who must be parties or ICC filing of the publication." 60 Transp. Practitioners J. at 265. However, in *Jasper Wyman*, the Commission noted:

> [We] meant simply that because of the pending copyright litigation, involving the right to author a mileage guide, [we] would not *preclude any author from filing a mileage guide* with the Commission, nor deny any carrier's right to participate in any filed mileage guide. However, a carrier election to participate in a filed mileage guide of choice still required compliance with power-of-attorney and participation regulations.

Jasper Wyman, 8 I.C.C.2d at 252 (emphasis by Mr. Goodman). Thus, "[t]he two-sentence revision of the 1984 language suggests that in 1992 the Commission is embarking on the clearly troublesome path of retroactive rulemaking." 60 Transp. Practitioners J. at 265.

In sum, there is no nexus between the tariff voiding provisions of 49 C.F.R. § 1312.4(d) and the rules governing distance guides set forth in 49 C.F.R. § 1312.30. To find a nexus requires such a convoluted and unnatural construction of these rules as to violate the aforementioned § 1312.1(c)(3) provision that "[t]hese regulations are to be *liberally construed*. The absence of *specific approval* of particular practices or provisions *does not imply disapproval* of them". (emphasis added).

III. THE ICC'S "VOID-FOR-NONPARTICIPATON" RULE EFFECTS A RETROACTIVE TARIFF REJECTION IN EXCESS OF THE ICC'S STATUTORY AUTHORITY AND IN VIOLATION OF *ATA*

The ICC argued in *Overland* that its *Jasper Wyman* decision did not retroactively reject Overland's tariff because an incomplete tariff filing cannot, by definition, give rise to a filed rate. However, this is simply not correct. As found by this Court in *ATA*, while the Commission's ability to cancel the *prospective* effect of a tariff is broad, the Commission's ability to *retroactively* reject a tariff is severely limited. The D.C. Circuit correctly noted this distinction and also addressed the ICC's argument that its ruling did not retroactively reject the tariff because the tariff was "never in effect." The D.C. Circuit considered and properly rejected the ICC's faulty logic, noting that the Commission cannot "slip" the limitation on its ability to retroactively reject by simply claiming that under the rule the tariff never took effect. 996 F.2d at 360-61. When the Commission accepts a tariff for filing and later claims that the rate contained in that tariff was never effectively on file, the Commission is effecting a retroactive rejection of that tariff. Claiming that the tariff was never "effective" does not change the impact of the ICC's action.

IV. THE ICC's VOID-FOR-NONPARTICIPATION POLICY DOES NOT MEET THE *ATA* STANDARD FOR PERMISSIBLE RETROACTIVE REJECTIONS

In *ATA*, this Court held that the Commission may effect a retroactive rejection only if the remedy "furthers a specific statutory mandate . . . and is directly and closely tied to that mandate." 467 U.S. at 367. The Commission claimed (and the *K-Mart* court agreed) that the void-for-nonparticipation rule furthered the statutory "mandate" to prescribe the information which must be included with tariffs. *See* 49 U.S.C. § 10762(a)(1); *Overland*, 996 F.2d at 362. The D.C. Circuit considered and rejected the same argument. "We rather doubt that § 10762(a)(1)'s *permissive authorization* for the Commission to require carriers to include other unspecified information is the type of 'specific statutory mandate' the Court had in mind in *ATA*." 996 F.2d at 362 (emphasis added). This conclusion was adopted by the Seventh Circuit in *Brizendine*, 4 F.3d at 464 ("We also question whether such a goal [the requirement of participation] regardless of its validity, would be backed by a specific statutory mandate of the kind [*ATA*] requires.") and the Sixth Circuit in *P-Y Transportation*, 3 F.3d at 970 n.2.

In fact, the D.C. Circuit found that the Commission's void-for-nonparticipation rule actually hinders the specific statutory mandate of the filed-rate doctrine. The D.C. Circuit noted that while rigid adherence to the filed rate may sometimes render harsh results, the harshness of the filed rate doctrine is justified in order to further the primary goal of the Act, i.e. the prevention of discrimination. Conversely, the ICC's void-for-nonparticipation rule actually frustrates that statutory goal. "That purpose is

hardly served, indeed it is undermined, by an ICC policy that would make the disclosed rate unreliable . . . " 996 F.2d at 361.[11] The D.C. Circuit thus appropriately recognized the nonsensical argument made by the ICC "that retroactive rejection (that is deviation from the filed rate) is necessary to promote the filed rate doctrine." 996 F.2d at 361 n.6. In reality, all that is promoted by retroactive rejection is adherence to secret, negotiated rates.

V. THE *DAVIS* AND *BERWIND-WHITE* OPINIONS PREVENT TARIFF IRREGULARITIES FROM VOIDING A CARRIER'S TARIFF

That the ICC has the authority under 49 U.S.C. § 10762(e) to "reject a tariff submitted to it by a common carrier . . . if that tariff violates . . . [a] regulation of the Commission . . . " is not disputed. Overland's tariff was on file with the ICC and was not rejected. Thus, Overland's tariff cannot be disregarded or treated as nonexistent merely because of some element of substantive unlawfulness in the rate or some irregularity in tariff filing formalities. Instead, so long as the shipper is charged no more than the tariff rate on file with the ICC, the filed rate must be enforced. *Davis v. Portland Seed Co.*,

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[11] Not being constrained by the hobgoblin of consistency the Commission sometimes recognizes the importance of reliance upon tariffs it has accepted for filing. *Reconsideration of Special Tariff Authorities Authorizing The Publication of Customer Account Codes in Tariffs*, No. 40888, unprinted (served September 1, 1993). In fact it notes there that even tariffs which fail to "comply with the statutory disclosure requirements" must be enforced if on file at the agency. Of course, the ICC in that decision was eliminating undercharge suits.

264 U.S. 404 (1924); *Berwind-White Coal Mining Co. v. Chicago & E. R. Co.*, 235 U.S. 371 (1914); *see also, Genstar Chemical Ltd. v. Interstate Commerce Comm'n*, 665 F.2d 1304 (D.C. Cir. 1981), *cert. denied*, 102 S.Ct. 1750 (1983).

In *Davis*, this Court recognized " . . . that the carrier violated the statute by publishing the lower rate for the longer haul without permission. . . . " The Court nevertheless ruled that " . . . mere publication of the forbidden lower rate did not wholly efface the higher intermediate one from the schedule and substitute for all purposes the lower one. . . . " 264 U.S. at 424-25. In *Berwind-White*, Chief Justice White's memorandum opinion affirmed the lower court's decision finding the railroad's submission of a letter to the ICC stating that its demurrage charge would be $1.00 per day was sufficiently formal to comply with the law. "The documents were received and placed on file by the Commission without any objection whatever as to their form, and it is certain that, as a matter of fact, they were adequate to give notice." 235 U.S. at 375. More recently, the D.C. Circuit in *Genstar* summarized this Court's holdings in *Berwind-White* and *Davis*:

> The principle in these cases is that where the shipper has been charged no more than the rate reflected in the tariff on file, the remedy for any unlawfulness or irregularity is measured not by looking to some other tariff but by the harm, if any, caused by the unlawfulness or irregularity.

665 F.2d at 1308.

In *Genstar*, the carrier had improperly filed an increase in its tariff rates by failing to include the proper notations to its increase in rates (which notations were

required by the ICC's regulations). The D.C. Circuit held that a tariff on file with the Commission, and never rejected cannot be ignored simply because of "some element of substantive unlawfulness in the rate." 665 F.2d at 1308. The D.C. Circuit decision in *Overland* correctly notes (directly in line with the *Genstar* opinion) that not all defects warrant complete abrogation of the carrier's tariff, but rather the ICC should fashion a remedy more closely related to the harm caused. 996 F.2d at 361-62. *See, e.g., Genstar,* 665 F.2d at 1309-10.

Finally, the D.C. Circuit recognized that even if a shipper had noticed that the carrier was not a participant in the Mileage Guide, it hardly warrants ignoring the carrier's entire tariff. The ultimate purpose of the ICA is to prevent price discrimination, and the policy espoused by the ICC hinders rather than furthers that goal.

> The carriers and the shippers are bound by that which is openly disclosed so as to prevent price discrimination. That purpose is hardly served, indeed it is undermined, by an ICC policy that would make the disclosed rate unreliable unless the shipper took the extraordinary step of determining whether a carrier's tariff filing was defective because its power of attorney was not up to date.

Overland, 996 F.2d at 361. Amicus submits that the D.C. Circuit's opinion furthers the purposes of the Interstate Commerce Act, and the *K-Mart* decision does not.

CONCLUSION

For the reasons set forth herein, and in Petitioner's brief, Amicus respectfully requests that this Court reverse the decision of the Third Circuit and order such other relief as it deems appropriate.

Respectfully submitted,

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BEFORE THE
INTERSTATE COMMERCE COMMISSION

Overland Express, Inc. Complainant v. Jasper Wyman & Son Defendant	Docket 40510 Jasper Wyman & Son *Et Al* Petition for Declaratory Order – Certain Rates and Practices of Overland Express, Inc. Embracing: Case Nos. IP 90-499-C, IP 90-506-C; IP 90-582-C; IP 90-641-C; IP 90-787-C; IP 90-926-C

AFFIDAVIT
OF
DON H. NORMAN

DATE: July 25, 1991

My name is Don H. Norman. I am President and Owner of Don H. Norman Associates, Inc. (DNA), whose executive office and principal place of business is located at 8301 Greensboro Drive, Suite 1190 in McLean, Virginia 22102, and additional offices maintained within the Interstate Commerce Commission Building, Room 4330, in Washington, D.C. Don H. Norman Associates is a transportation consulting firm, specializing in rate and tariff research and rate information dissemination involving motor carriers and railroads as well as preparation and publication of tariffs for surface transportation companies. The firm compiles, publishes and files thousands

of tariff pages annually with the Interstate Commerce Commission (ICC or Commission) and other regulatory agencies.

The research and watching service aspects of the firm are personally monitored and reviewed by me. These services include the preparation of pricing initiatives and daily briefings to carrier and shipper interests from our office within the Interstate Commerce Commission. I have been afforded the opportunity to review and research virtually every conceivable type of tariff initiative filed with the Commission for the past 35 years. Since the inception of the firm, I have also been involved in the rate research and tariff publishing activities of DNA. I have prepared and advanced verified statements, affidavits and testimony as an expert witness before the Interstate Commerce Commission and the courts.

I have been requested by the estate of Overland Express, Inc. to review the Petition for Declaratory Order in Docket No. 40510 (Jasper Wyman & Son, et al. – Petition for Declaratory Order – Certain Rates and Practices of Overland Express, Inc.) as filed by Mr. William J. Augello, et al. I have also been asked to determine if a nexus exists for application of mileages to filed rates of Overland Express, Inc., in their tariffs ICC OVLA 200, 200-A, 202, 202-A, 203 and 203-A, and to explore the practices and applicability provisions for other carriers referencing the Household Goods Mileage Guide and/or other publications as a methodology for assessing miles to filed rates with the Interstate Commerce Commission.

1. IF THE COMMISSION WERE TO FIND THAT HGB MILEAGE GUIDE 100-B HAS NO APPLICATION FOR FILED RATES IN OVLA 202 AND 202-A AND WERE VOID AS A MATTER OF LAW, THEN THE MILEAGES WOULD BE REQUIRED TO BE COMPUTED FROM THE REMAINING MILEAGE GUIDE APPLICATION, NAMELY HGB 105.

At the outset, a clarification must be made to Mr. Augello's statement at Page 3 of the original petition filed by Jasper Wyman & Son, Et Al., which reads, "As the Commission well knows, the Household Goods Mileage Guide No. 100 is completely distinct from Household Goods Zip Code Mileage Guide 105." The implication by Petitioners is that somehow in the absence of proper reference to Mileage Guide 100, reference to Mileage Guide 105 could not be utilized to determine mileage rates. Yet, the Household Goods Carriers' Bureau publishes *two* mileage-based guides for application of provisions for mileages in connection with rates filed at the Commission. Carriers routinely reference one or both guides as a methodology for computing mileages to filed rates. Overland Express, in tariffs 202 and 202-A, did in fact make specific reference to *both* mileage guides effective with February 6, 1985. Exhibit "1"

The Commission has recognized that these two mileage guides conflict with one another and if a conflict exists between the two, a shipper is entitled to that interpretation which will render to him the greater benefit. As an example, see Informal Opinion of Mr. Lawrence C. Herzig, Section of Rates and Informal Cases, RCC-19845-88, Exhibit "2".

It follows, then if the Commission completely removes one of the mileage guides from application, the conflict ends and the remaining mileage guide must apply, despite whether it would produce higher or lower mileages than the now rejected guide. Similarly, whenever a carrier restricts application of one guide over another to prevent a conflict between the guides, the restriction would be rendered meaningless by the striking of one guide. The following facts highlight the applicability of HGB 105 in the event HGB 100 is stricken.

Overland Express, Inc. had effective participation in Household Goods Mileage Guides by these outlined facts:

1. Overland Express, Inc. did execute and file a full power of attorney with Household Goods Carriers' Bureau, Inc., Agent for participation in one or more of their Mileage Guides. (This power of attorney was subsequently restricted by someone to apply only to Household Goods Mileage Guide No. 105.)

2. Household Goods Carriers' Bureau publishes *two* mileage based guides for application of "mileages" used by Overland Express, Inc., in the determination of the miles for distance mileage commodity rates.

3. Overland Express was listed as a participating carrier to one of these guides in Supplement 13 to ICC HGB 101-B effective December 28, 1984. It therefore has filed an appropriate power of attorney with Household Goods Carriers' Bureau, paid participation fees, and has obtained tariff compliance by its agent, Household Goods Carriers' Bureau by the filing of Supplement 13 to

ICC HGB 101-B, effective December 28, 1984.

4. Overland Express, Inc. filed with the Interstate Commerce Commission, tariff ICC OVLA 202 (1 RP 131) and Original Page 125, 202-A, effective February 6, 1985 and September 10, 1986. Exhibit "1" Item 25 of that publication under Governing Publications lists both Household Goods mileage based guides. The Mileage Guide HGB 105 is restricted to apply only when specific reference is made thereto.

5. As an example, a review of ICC OVLA 202-A reflects the application of, and the determination of, mileage by the use of Mileage Guide 105 in Item 6200 on Original Page 373, ICC OVLA 202-A. Exhibit "3"

6. The referencing of two Mileage Guides in the Governing Publications required the restriction of one Guide; (1) (applies only when specific reference is made hereto) to avoid conflict in mileage application. Exhibit "1"

7. Household Goods Carriers' Bureau, Mileage Guide ICC HGB 105-A lists as a Governing Publication, HGB 100-B. Exhibit "4"

8. Section 6 (distance commodity rates application, Original Page 387) and Section 8 (distance commodity rates application, Original Page 389) to ICC OVLA 202-A provides: Exhibit "5"

> "Mileage for the rates shown herein are obtained from governing Mileage Guide, see item 25."

The framer of Overland Express, Inc., ICC OVLA 202-A, recognized the conflict between the two mileage based guides and restricted ICC HGB 105 to apply only when specific reference was made thereto. Since Household Goods tariff 100-B was intended to provide application for other provisions in this tariff, the restriction of ICC HGB 105 was necessary.

It is a well-settled principle of tariff interpretation that the intention of the framers of the tariff is to be considered, and if all of the pertinent provisions of the tariff considered together may be said to express the intention of the framers under a fair and reasonable construction, that intention must be given effect. *Forbes & Sons Piano Co. v. A.G.S.R.R. Co.*, 118 I.C.C. 185, 186 (1926), and *Peterson Biddick Co. v. Chicago B & O R Co.*, 15 I.C.C. 376, 377 (1929) and No. 40417 D.W. Davies & Co., Inc. vs. Express Freight Lines, Inc., ICC Decision decided May 6, 1991.

If, in fact, ICC HGB 100-B is determined to be a nullity, the only remaining governing Mileage Guide contained in Item 25 would be ICC HGB 105, and the NOTE (1) (Exhibit "1") applies only when specific reference is made hereto would have no force or effect. Application of mileages for rates shown in Section 6 and Section 8, would be obtained from the remaining governing Mileage Guide (see Item 25), namely, 105. This would require the re-rating of all undercharges on the basis of mileages contained in Household Goods tariff 105.

2. EVEN IF THE ICC FINDS ALL MILEAGE RATES WHICH REFER TO HGB 100 VOID, OVERLAND WOULD STILL BE ENTITLED TO COLLECT THE TARIFF CHARGES BASED UPON THE RATES IT HAD IN EFFECT ON MAY 22, 1983, THE DATE OVERLAND WAS OFFICIALLY STRICKEN FROM PARTICIPATION IN HGB 100.

If for the first time in connection with distance guides, the Commission were to make a finding that these provisions are void under 49 C.F.R. 1312.4(d) as a matter of law, then prior filed rate provisions maintained by Overland would be re-established as effective filed rates. This would be consistent with Commission practices in the rejection of tariff publications or suspension proceedings, which hold in force tariff filings purported to be cancelled by the filed tariff.

3. BASED UPON THE COMMISSION'S HISTORIC ACCEPTANCE OF DISTANCE RATES FILED WITHOUT PARTICIPATION IN HGB 100 AND/OR IN VIOLATION OF 49 C.F.R. 1312.30(c), IT IS NOT REASONABLE TO CONCLUDE 49 C.F.R. 1312.4(d) WOULD RESULT IN THE VOIDING OF DISTANCE RATES.

49 C.F.R. 1312.4(d) which petitioners argue requires a carrier that uses a Guide of an agent, to file a concurrence or power of attorney with the issuer of that Guide was gratuitously added to the promulgated regulations at 49 C.F.R. 1312 to protect these types of publications when the requirement to file powers of attorney and concurrences with the Commission was discontinued in their revised regulations. Since 1984 the Commission has not

made any review of publications received for filing covering this requirement. Compliance is only brought about by the enforcement of copyright provisions by the author or publisher of these Guides. The provisions of 49 C.F.R. 1312.4(d) did not appear in the prior regulations at 49 C.F.R. 1310, nor do they now appear in new regulations published by the ICC at 49 C.F.R. 1314.

I assume that the provisions of 49 C.F.R. 1312 were lawfully promulgated under the requirement of the Administrative Procedure Act. However, inquiry to the Commission for review of docket 37321 to verify compliance with the Administrative Procedure Act has been unsuccessful. The file is missing from the Commission's records and as of the date of this statement, they have been unable to locate the document. Surely if 49 C.F.R. 1312.4(d) was promulgated to void distance rates, the ICC would have rejected at least a few such improperly filed rates during the past seven years. Yet, my daily review of Commission decisions fails to reveal even a single such rejection of an improperly filed mileage tariff.

As an example, a study of filings for the months of April and May, 1991, with the Commission shows that more than 230 carriers (Exhibit "6") filed tariffs that contain rates which reference the Household Goods Mileage Guide as a methodology for determining miles applicable to these filed rates. These publications have been accepted and passed to the tariff files without criticism or rejection by the ICC even though as initially filed they did not have effective participation in the Household Goods Mileage Guide which they reference as a governing publication.

The rampant lack of enforcement by the Commission of any requirement that carriers comply with the need for effective participation in the Household Goods Mileage Guide is further supported by the statement made by Joseph Harrison, President of the Household Goods Carriers' Bureau, that three years ago, only 40% of the companies using Mileage Guide 100 had a power of attorney on file (See *Traffic World*, June 17, 1991, page 33, Exhibit "7"). Based upon this statement, I believe that over 15,000 carriers would have ineffective mileage rates should Petitioner's view of 49 C.F.R. 1312.4(d) be accepted by the Commission. This figure is based upon the listing in the participating carrier tariff HGB 107 of approximately 10,000 carriers in 1987. If this represents only a 40% compliance figure, the total number of carriers using HGB 100 would be approximately 25,000 leaving 15,000 carriers who improperly referred to the mileage guide by failing to have an effective power of attorney on file with the Household Goods Carriers' Bureau.

My daily review of the mileage based tariffs filed by carriers with the ICC also indicates that the Commission since 1984 no longer provides any oversight or review for applicability or methodology for applying mileages to filed rates at the ICC. The Commission accepts routinely improper (i.e. not authorized by 49 C.F.R. Section 1312.30 (g)) methodologies for determining mileage in connection with filed rates. The following recent filed examples are typical references:

1. *Distances or mileages will be determined by use of odometer reading* at origin and destination (not filed with ICC) Exhibit 8: Little Bear Oil Company, ICC LBOL 400

2. *Mileage Guide – current Rand McNally Road Atlas* (not filed with ICC) Exhibit 9: Doug Wheadon Trucking, ICC WHDG 300

3. *The latest edition of the Official United States Highway Map issued by Rand McNally & Co.* (not filed with ICC) Exhibit 10: Don's Mobile Homes, ICC DSMH 20

4. *Rand McNally's Road Atlas* (not filed with ICC) Exhibit 11: B.R. James Trucking, Inc. ICC JMBR 200

5. *Mileage map as published by Rand McNally* (not filed with ICC) (See Exhibit 12, Ricsons, Inc., ICC RCSO 400-A).

Our survey also discloses a number of non-traditional publications for reference to applications of mileage in connection with filed rates at the ICC. As an example, the following publications have also been received and accepted for filing by the ICC, which referenced electronic or computer applications for mileage and no participating carrier link is on file:

(1) P.C. Miler issued by J. J. Keller & Associates (not on file with ICC)

Exhibit 13: Simpson Transportation, Inc.
ICC SIPP 4000

(2) Mileage Guide ICC ALKP 1001-A issued by ALK Associates, Inc. (participation not on file with ICC)

Exhibit 14: MHF, Inc.
ICC MHFI 200 (1 RRP 2)

(3) P.C. *Miler Practical Miles Version 5.00 (not on file with ICC)

Exhibit 15: Cardinal Transport, Inc.
ICC CRDT 4859-D

(4) Mileage Guide: Information Software ICC ISIC 101 (participation not on file with ICC)

Exhibit 16: J. V. Motor Lines, Incorporated
ICC JVML 223-C

(5) Mileages to be determined by the Rand McNally Milemaker (not on file with ICC)

Exhibit 17: Chief Freight Lines, Inc.
ICC CEFG 4100 (1 RP 2)

(6) For Mileage: ALK Associates, Inc. ICC ALKP 1001-B and ICC ALKP 1000-C (Alternate and Shortest Route) (participation not on file with ICC)

Exhibit 18: Centennial Express, Inc.
ICC CXIN 200-A (Original Page 4)

(7) Mileage Guide – Prophesy Pro Driver Mileage System issued by Information Software, Inc., Grandy, CT (participation not on file with ICC)

Exhibit 19: Transportation Resources & Management
ICC TSNM 200-A (3 RP 2)

The Commission has provided space in their public tariff file for the positioning of terminals for access by the public of mileage to these data bases. There are, however, no *filed* tariffs for the aforementioned carriers that reflect participation to these data bases. Inquiry into the data

base, in some instances, may provide some carrier participation (Exhibit 20) but prior participating carrier listings were in transmittal form (see ALK Associates, Inc. Transmittal 89-0340) and are different standards than those which the Commission is applying to Overland Express, Inc. I believe by the Commission's informal opinions holding that Overland Express, Inc. does not have effective application of mileages to filed rates, they are establishing a different standard for Overland than they apply to other carriers.

4. THE COMMISSION DOES NOT PRESENTLY ENFORCE PROVISIONS OF 49 C.F.R. 1312.4(d) OR 1312.27(e).

Based upon my daily oversight of carriers filings with the ICC, I have found that carriers routinely reference, and the ICC accepts for filing, tariffs which do not contain a participating carrier list and therefore no powers of attorney are issued. The Standard Transportation Commodity Code tariff, ICC STCC 6001-S (Exhibit 21) issued by Western Trunk Line Committee, Agent, et al., is such an example and is widely used in lieu of participation in the National Motor Freight Classification for commodity identification. The technical committee membership of the publication is made up of representatives from railroads and motor carriers; the National Railroad Freight Committee, the National Motor Freight Traffic Association, Railroad and Motor Carrier Associations and Conferences including the National Industrial Transportation League, along with U.S. Government Liaison Membership. If the Commission's "standards" for

referencing governing publications for effective application to filed rates requiring an effective power of attorney and a participating carrier tariff is to be applied, then thousands of tariffs in addition to mileage based tariffs are subject to be stricken from the Commission's files and may be void as a matter of law. Compliance with 49 C.F.R. 1312.27 (e) requires a carrier to participate in any governing tariff that it refers to in its publication. Yet, here we have a publication which does not require or provide for participation in a tariff on file with the ICC by waiving inclusion of a participating carrier list in the publication and by not providing a separate participating carrier's tariff.

Based upon the ICC's acceptance of the STCC tariff, which did not require a participating carrier's tariff and based upon the fact that the Commission has accepted literally thousands of carrier tariffs that have mileage rates which refer to HGB 100 without being listed as "participating carriers" and without later rejecting a single such tariff, it is inconceivable that the Commission intended 40 C.F.R. 1312.4(d) to allow the retroactive rejection of mileage based rates.

Rather, I believe it was the Commission's intent to not interfere with the copyright provisions of similar classifications or mileage application guides which prompted the inclusion in 49 C.R.F. [sic] 1312.4(d) the provisions for Non Applicability of Rates as a Matter of Law. This way the ICC would not give its "regulatory blessing" to the inclusion of copyrighted materials in carriers' tariffs.

The issue of powers of attorney to filed rates with the ICC has always been one of copyright and equity, not tariff applicability. Prior to the promulgation of tariff rules at 49 C.F.R. 1312 in 1984, there was no provision for the voiding of rates filed without powers of attorney. Also, it would not be equitable for a non-participating carrier to take advantage of the publication expense of the Household Goods Carriers' Bureau and/or Rand McNally in the publication of the Household Goods Mileage Guide while declining to share in that expense. Consequently, in return for filing the Mileage Guide with the ICC on behalf of participating motor carriers, the Household Goods Carriers' Bureau requires the payment of a participation fee and the execution of a power of attorney which will ensure that all carriers who benefit from the joint guides share in the expenses of its compilation and publication.

The question of participation in the Household Goods Mileage Guide is simply one of copyright and equity, and the Commission has long recognized this. Since the Commission has abdicated all oversight in connection with this requirement, compliance is brought about by the enforcement of copyright provisions by the author or publisher of these Guides.

In the ICC decision No. 3886, Petition for Intervention and Reconsideration of Special Tariff Authority No. 82-1827, and Petition for Declaratory Order concerning the lawfulness of copyrighted tariffs – served March 2, 1983, the Commission said, "The reopening of Special Tariff Authority No. 82-1827 granting symbolization relief denied. Declaratory Order and Rulemaking concerning the propriety of filing copyrighted tariffs denied." The

Commission went on to say "regardless of our views on copyright, the circumstances surrounding the filing of copyrighted tariffs are not sufficiently compelling to warrant issuance of the proposed Declaratory Order. Copyrighted tariffs are being published and filed, kept open and made accessible to the public consistent with the Act and their regulations, including those relating to the transmission of publications to subscribers. Therefore, we shall refrain from acting until the courts have resolved the issues relating to the validity of copyrighted tariffs."

The Commission, in 1981 under Special Tariff Authority No. 81-2583, Contract Carriers Schedule Referencing to Bureau Tariffs for Rates, granted to Commercial Lovelace Motor Freight, Inc., the right to reference existing rate bureau rates and tariffs in a proposed schedule of actual rates and charges filed with the Commission without the execution of powers of attorney or concurrences to those publications. Exhibit 22.

In that April 14, 1981 decision by the Commission, Acting Chairman Alexis and Commissioners Gresham, Clapp, Trantum and Gilliam said, "Reference to existing rate bureau rates and tariffs is permissible. However, we have not undertaken a thorough analysis of the possible antitrust issues raised by the proposal and we reach no conclusion whatever as to the property rights in the tariffs which are being infringed, as this is a matter for the courts and not for the Commission."

CONCLUSIONS

I conclude that a proper nexus exists between Household Goods Carriers' Bureau, Inc., Agent's Mileage

Guides and Overland Express, Inc. tariffs OVLA 202 and 202-A either through reference to HGB 105 or by the fact that the requirements of 49 C.F.R. 1312.4(d) are one essentially of copyright and not of applicability to a determination of mileage for filed rates. The Commission's repeated acceptance of mileage base rates by carriers who do not participate in Mileage Guide 100 proves the issues of participation in Household Goods' mileage guide are essentially those of a copyright controversy and, as the Commission has stated on a number of occasions, is to be settled by the Courts to enforce issues of equity to copyright.

AND FURTHER AFFIANT SAYETH NOT.

VERIFICATION

I have read the foregoing statement and the contents thereof are true and accurate to the best of my information, belief, and knowledge.

/s/ Don H. Norman
DON H. NORMAN

Subscribed and sworn to before me this 25th day of July 1991.

/s/ Jessie Ray Hodge
Notary Public

My Commission Expires: September 30, 1995

MOTOR COMMON CARRIERS MAKING TARIFF REFERENCE TO HOUSEHOLD GOODS CARRIERS' BUREAU MILEAGE GUIDE WITHOUT PARTICIPATION

April – May, 1991

CARRIER NAME	MC NUMBER	ALPHA CODE
A Victory Limousine Service	234421	AVCL
A.O.T. Limousine	239387	AOTQ
AAA South Central New England	237424	ASOH
AAA Transportation, Inc.	239211	AAPH
Air Freight Specialsits [sic], Inc.	45875	AFSO
Alcones L. A. Express, Inc.	239817	ALNP
All American Carriers, Inc.	241544	AAJY
Alliance International		ANIJ
Allied Towing Service, Inc.	167509	ALDW
Alvan Motor Freight, Inc.	1395	ALVN
America's Carriers, Inc.	185817	AIIE
American Asphalt Products, Inc.	165548	AAPP
American Marine Transport, Inc.		AMNP
Arab Cartage and Express Co., Inc.		ARAB
Atlantic Transfer, Inc.	177746	ASDD
Atwood Trucking, Inc.	181641	ATWT
B & M Consolidation, Inc.	164237	BMCA
B & R Services	239881	BRSS
B-Line Auto Transporting	241851	BQLN
B.H.S. Environmental, Inc.	155689	BHSI
Baldwin Transfer Company, Inc.	239703	BWIF
Baltzell's	198096	BTZL
Beattie & Son Trucking, John	219670	BJSO
Bevel's Inc.	234550	BVLS
Blacksburg Limousine Service	2164156	CYJT
Bost Trucking, Inc., R. Wayne	217789	BSQR

Brandt Construction Co.	233644	BSCO
Braun Milk Hauling, Inc., William F.	158715	BWMH
Byrum & Son, Inc., A. T.		BYRM
Byrum Trucking	241550	BYMT
C & H Transfer/Janitorial, Inc.	239530	CNHJ
C. D. J. Trucking, Inc.	190130	CDJT
Calhoun Transportation Service, Inc.	154108	CAHP
Canyon State Charters, Inc.	239204	CYNC
Carolina Transit Lines of Charlotte, Inc.	133336	CTLE
Central Blacktop Co., Inc.	237865	CBCH
Chief Freight Lines, Inc.		CEFG
Choctaw Express, Inc.	176315	CEXK
Chris Truck Line	238628	CSKL
Christopher, Inc. R. A.	238628	CSKL
Clark Express, Inc., B. L.	229289	CKBE
Colonial Freight Warehouse Co.		CFWH
Combined Express, Inc.	184326	CXIB
Consolidated Services		CDDV
Cook's Express, Inc.	164779	CKEP
Coonrod Wrecker and Crane Service	143852	COOW
Corbett, Cliff	238203	CBFF
Cotton Express, Inc.	215685	CNXE
Courtesy Cartage Co.	150251	CUGQ
Crussin Bus Tours and Charters	240766	CRUB
Curly's Towing	238801	CUOW
Curtin, Austin	240331	CUAN
D & M Distribution Service, Inc.	234787	DMDB
Dayton Freight Lines, Inc.	189528	DAFG
Direct Transit, Inc.	240733	DIRN
Dodd, William L.	239317	DWIL
Dommer, Inc., Elroy	152656	DOET
Dos Transportation	236321	DOSP

Double Diamond Distribution, Inc.	241491	DBDD
Dowd Trucking Corp.	240121	DWDK
Duffy Bros., Inc.	53989	DUFB
Dunworth, Inc., Jim	239726	DNWR
Emshoff, Vernon	236680	EMSH
Encore Transport, Inc.	239492	ENCR
Eog Freight System, Inc.		EOGF
ESI Trucking Incorporated		EXSI
Excellent Transport, Inc.	198325	EXLP
Falcon Express, Inc.	240277	FEXI
Ferguson & Son's, W. L.	239986	FWLS
Fleetway Transport	238594	FWAP
Foreway Transportation, Inc.	146976	FOWN
Free Spirit Transport, Inc.	241442	FSPT
Freight Direct, Inc.	151822	FDIT
Freight Link New Jersey, Inc.	232394	FLNJ
Freight Sales, Inc.	180465	FSIP
Friendly Freight Forwarders, Inc.		FFRF
Galil Moving & Storage, Inc.	236599	GLIV
Gemini Transit, Inc.		GEIN
Genso Cartage Co., W. A.	237819	GWAC
Georgia Southern Transportation, Inc.		GASR
Giorgio Foods, Inc.	233608	GRGO
Gladden Trucking Co., Inc.	156849	GLDM
Golden West Travel, Inc.		GWVL
Goodin Bros., Inc.	193860	GOOB
Grant, Inc., Rich		GRRH
Grayline Tours of Dallas/Fort Worth	241422	GDFW
Green Arrow, Inc.	152843	GAOI
Green Express, Inc.	176100	GNXI
Gulf Coast Transport, Inc.	195515	GUCT
Gwen Tours, Inc.	242429	SCAC

H & S Sand & Gravel Haulers Company, Inc.	233659	HHSG
Hayes & Son's Ltd., R. J.	240581	HRJS
Hendricks, Aaaron [sic]	239196	HDRK
Hendrix Transport, Inc.	238403	HNXT
Hicks Trucking, Inc.	238046	HCKK
Hieden Feed & Supply, Inc.	234767	HFNS
Hobson Transfer	167718	HBAT
Hoffman, Richard J.	241843	HFRJ
Holman Transportation, Inc., D. L.	216765	HDLP
Homer Trucking Inc.	235503	HMRK
Howard, Inc., Lewis C.	206953	HWLC
Huma Hauling	240116	HMAH
Hushpuppy Express	239923	HSPY
Hyland Horse Transportation	240368	HYHR
I. A. T., Incorporated		IATI
I. L. O. Carriers, Inc.	239612	ILOC
Industrial Freight System, Inc.	120822	IDRL
Inland Express Lines, Incorporated		IEXL
Interboro Messenger Service	240376	IBMS
Intercity Transport, Inc.	207468	ITIX
Interstate Trucking Corporation of America		ITCA
Iowa Tank Lines, Inc.		ITLD
Itz-Ohlson Transport, Inc.	240943	ITZO
J. A. Trucking, Inc.	182834	JAWN
J.D.R. Oilfield Services, Inc.	239966	JDRO
J.K.C. Express	180904	JKCE
Jacobs, Tim	191789	JCBS
JHM Enterprises, Inc.	236954	JHME
Jim's Hauling, Inc.	241104	JMHI
Jordan Bus Service, Inc.	230040	JBSE
K & R Delivery, Inc.		KNRQ
Keelen and Sons, Inc., Pat	240131	KPNS

Kindersley Transport Ltd.		KIDY
L & K Industries, Inc.	234999	LKII
Laughlin, Transit, Inc.		LAGN
Lemmond's Marine	240264	LMMD
Leonardo Truck Lines, Inc.	26377	LEOL
Logistics Services, Inc.	205326	LGCS
Loomis Transportation	231685	LOOT
Los Angeles Yuma Freight Lines, Inc.	14045	LAYM
M & M Cartage	239636	MMCT
M.S.L. Leasing Company, Inc.	148848	MSLL
Mansun North, Inc.	166584	MNI
Matthews Trucking, Gaylord L.	238441	MGLK
McGregor Cartage Co., Inc.	156502	MGRC
Midatlantic Transport Corporation	176885	MIDN
Midwest Delivery		MWDL
Mike's Moving & Trucking Inc.	219889	MKNN
Mississippi Transport, Inc.	161945	MIPP
Modern Transportation Company	240195	MNPA
Montgomery Trucking	239228	MGOR
Morris Trucking, George	238225	MGEO
Morristown Driver's Service, Inc.	177575	MSDV
Morton Grove Transport System, Inc.	205966	MRGV
Murphy Transportation, Inc.	174171	
Myers Group (U.S.), Inc., The	237952	MGUS
Nelson Trucking, T. P.	236331	NTPT
New Cops, Inc.	240801	NCPS
NK Parts Industries, Inc.	206290	NKPI
Noramco Transport Corp.	240918	NRTC
Norris Grain & Transportation, Inc.	240684	NRGI
Oasis Enterprises, Inc.	238990	OASE
Ottawa Country Farm Supply	195306	OCFS
Over the Hill Transport, Inc.	240591	OTHP

P & H Trucking, Inc.	237012	PNHG
Parkway Bus Service	197101	PWBS
Pasco Lines, Inc.	239357	PLIQ
Peach Transport, Ltd.	238816	PCHL
Perfect Limousine	238520	PFCL
Phoenix Express, Inc.		PHXE
Piggyback Specialists, Inc.	224662	PIGY
Pollock Transport, J.	238445	PLKJ
Premier Charter Service	240230	PCHV
Premier Furniture Delivery, Inc.	239802	PMFD
Prestige Limousine Service, Inc.	237564	
Priority Mail & Messenger Service, Inc.	176535	PMMS
Pro Truck Lines, Inc.		PTLP
Pro-Courier, Inc.		PCUR
Professionally Yours Tours	241199	PFSO
R & A Trucking Co. of Minnesota	55414	RNAK
Raleigh Air Cargo Express, Inc.	212802	RACG
Raleigh Air Cargo Express, Inc.	212802	RACG
Rauch, Inc., Steve	234614	STRA
Rehagen Bros. Trucking	242109	RJGB
Rem Transport		REOR
Ridge Express Co., Inc.	237447	RIDG
Road Burners Tours Bus Service, Inc.	238860	RBUR
Robb, Susan R.	235971	RYNR
Russo, Trucking Company, Inc., Laber	42796	RLTK
Sal-Son Trucking Co., Inc.		SLSN
Salo Salvage Corporation	239723	SAOV
Santini & Co., Inc., Alfred	21313	SAAC
Satilla Coach	217794	SCAH
Savercool Clay Sales, Inc., R. C.	240171	SVLR
Schmidt, Michael J.	239911	SDMJ
Security Motor Service, Inc.	241299	SEMS

Service Motor Transportation Co.	58790	SERM
Service Transport	140392	SERJ
Simon Trucking, Inc., Dick		SILD
Slama Trucking, Robert	238355	SLAJ
Smith Trucking	178789	SMBN
Southfield Cab Co.	177106	SFCB
Special Transport Service	218636	STXV
Starling's Auto Transport	239370	SGAO
Statewide Home Supply Service, Inc.	203372	SWHV
Stevens Transport, Inc.	150578	STVV
Sturgeon Truck Leasing	240155	SGEO
Sun Coach Lines	151711	SNCH
Sun Coach Lines of Colorado, Inc.	236344	SNQC
Sundown Transport	241624	SDWO
Susquehanna Transit Company	148069	SHT
T & T Trucking, Inc.	222974	TTTE
T. L. Express	206385	TLDA
Taylor Distributing Company	22276	TADS
Taylor Transportation, Inc., Darryl B.	178489	TDBT
Tecopa Hot Springs Transportation Incorporated	160258	TCOH
Terminal Consolidation Company, Inc.		TCCY
Terrco Distributors, Inc.	233126	TCDO
Thomas Trucking, Sidney	239654	TOSD
Tibbetts House Moving	239672	TBHM
TNT Dugan, Inc.		DUGN
Today Transportation, Inc.	239604	TDAY
Total Courier	237926	TCUR
Transpro Carriers, Inc.	211518	TCRN
Tri-Western Express, Inc.	117832	TRWR
Triple J Ranch	193508	TPJR
Valley Express, Inc.	149591	VLEP

Van's Interstate Service, Inc.	196448	VISI
VC Trucking Inc.	238882	VCTJ
Vidmar, Inc.	224788	VDMR
Walker, Michael W.		NTEN
Weldon and Peck Trucking	234638	WNPT
Westburne Transportation Services, Inc.	237713	WTBE
Western Industries, Inc.	186540	WEIJ
Westside Carriers	236314	WSDE
White Line Trucking	215460	WHLF
Williams, Gilbert	240190	WGIL
Winfield Charter Company	240056	WNFC
Winkler Trucking, Inc.	235170	WNKR
Wylie Corp., E. W.	149406	WYLC
Yaeger Co., D. L.	239107	YDLC
Young Equipment Co., Inc., Clayton	230912	YCEC
Young, Robert	236514	YROB

EAS 1144
February 20, 1990

Mike Walker, Special Agent
Kansas City, MO

James E. Manning
Chief, EAS Branch, BOT

Verification of rates and charges – Bar Enterprises

This is in response to your memorandum of January 19, 1989, concerning fifty three OCP-F-19 tables submitted for rate verification.

Three of the carriers, LaRochelle, Inc., Barlow Truck Lines, Inc., and Trumpet Transport Co., maintain only mileage rates to cover the involved shipments in their respective tariffs. These carriers tariffs refer to Household Goods Carriers' Bureau Mileage Guide to determine the distances, but these carriers never issued a power of attorney or otherwise concurred in the Household Goods Carriers' Bureau Mileage Guide. Therefor [sic], all mileage rates are void as a matter of law (49 C.F.R. 1312.4(d)). We have indicated on the tables the rates for these carriers that would have applied had these carriers participated in the Household Goods Carriers' Mileage Guide.

Cal-Inland also did not participate in the HGB mileage guide, but it did maintain higher point-to-point rates on the involved shipments. These point-to-point rates are shown in the tables.

The other carriers' rates and charges have been verified and/or corrected.

All papers are returned.

INTERSTATE COMMERCE COMMISSION

Memorandum

DATE: 1/19/89

TO : OCCAE, Frank D. Bail
/s/ Mike Walker

FROM : SA Mike Walker, K.C., MO

SUBJECT : REQUEST FOR RATE VERIFICATION

I have enclosed the Table of Rate Referrals and supporting freight bill and bill of lading copies for 53 exhibits involving rate defeats in the Bar Enterprises investigation, C-88-89. Please provide rate verification for these 53 shipments.

Approved for transmittal: /s/ D. V. Armitage
D. V. Armitage, RCO

INTERSTATE COMMERCE COMMISSION

TABLE OF RATE REFERRALS

SUBJECT OF INVESTIGATION: Richard M. Stephens, d/b/a Bar Enterprises ; Jon L. Girod; and Ness and Co.

EXHIBIT NUMBER: 2

INVESTIGATION NUMBER: C-88-89

CONSIGNOR: Wilson Foods Corp + Swift-Eckrich Inc.	CONSIGNEE: McDonald Wilke.
ORIGIN: K.C. Victrib. Cowley KC, KS + K.C. Distrib. Cowley KC, KS	DESTINATION: Portland, OR
ROUTE:	FREIGHT BILL NUMBER: 4-88-084 DATE: 4/22/88

B/L NO. AND DATE	COMMODITY DESCRIPTION AS BILLED	WEIGHT	RATE	OTHER CHARGES	TOTAL CHARGES
	fresh assorted meats	1792 miles	$1.05 per mile	8 stops $40 @ = $320	$1881.60 + 320 $2201.60
	COMMODITY DESCRIPTION AS SHOULD HAVE BEEN BILLED: fresh assorted meats	1792 miles	$1.19 per mile	8 stops $50 @ = $400	$2132.48 + 400 $2532.48

TARIFF AND RATE AUTHORITY

La Rochelle, Inc. MC-198625
ICC LARQ 200, Item 200
S/O Item 85

AMOUNT OF [ ] OVER OR [✓] UNDER CHARGES: $330.88

* Rate which has applied had carrier participated in NSA Mileage guide.

VERIFICATION BY BUREAU OF TRAFFIC

NAME AND TITLE: [illegible] TRA TA

DATE: 2-8-90

NAME OF INVESTIGATOR AND DATE: 1/10/90 Michael W. Walker, Special Agent

OCP-7-19 (7/81)

INTERSTATE COMMERCE COMMISSION TABLE OF RATE REFERRALS	SUBJECT OF INVESTIGATION Richard M. Stephens, d/b/a Bar Enterprises ; Jon L. Girod; and Ness and Co.	EXHIBIT NUMBER 6 INVESTIGATION NUMBER C-88-89
CONSIGNOR Wilson Foods Corp.	CONSIGNEE Peterson's	
ORIGIN K.C. Distrib. Center - KC, KS	DESTINATION Auburn, WA	
ROUTE	FREIGHT BILL NUMBER 102088	DATE 4/28/89

B/L NO. AND DATE	COMMODITY DESCRIPTION AS BILLED	WEIGHT	RATE	OTHER CHARGES	TOTAL CHARGES
	fresh meat & hams	2024 miles	$1.05 per mile	5 stops $40 @ = $200	$2125.00 + 200 $2325.20
	COMMODITY DESCRIPTION AS SHOULD HAVE BEEN BILLED fresh meat & hams	2024 miles	$1.10	5 stops @ $45.00	2226.40 225.00 $2451 40
TARIFF AND RATE AUTHORITY		AMOUNT OF [ ] OVER OR [X] UNDER CHARGES			$126.20

Ronald W. Winter, d/b/a Ron Winter Trucking MC-170848
ICC WIRN 2000, Item 300
S/O Item 40

VERIFICATION BY BUREAU OF TRAFFIC		NAME OF INVESTIGATOR AND DATE
NAME AND TITLE Marion Reynolds TRF TA	DATE 1-6-90	1/10/90 Michael W. Walker, Special Agent

OCP-7-19 (7/81)

INTERSTATE COMMERCE COMMISSION TABLE OF RATE REFERRALS	SUBJECT OF INVESTIGATION: Richard M. Stephens, d/b/a Bar Enterprises; Jon L. Girod; and Ness and Co.	EXHIBIT NUMBER 24 INVESTIGATION NUMBER C-88-89
CONSIGNOR John Morrell & Co.	CONSIGNEE Fleming Foods	
ORIGIN Great Bend, KS	DESTINATION Milwaukie, OR	
ROUTE	FREIGHT BILL NUMBER 14434	DATE 12/15/88

B/L NO. AND DATE	COMMODITY DESCRIPTION AS BILLED	WEIGHT	RATE	OTHER CHARGES	TOTAL CHARGES
	cured meats	1613 miles	$1.10 per mile	—	$1774.30
	COMMODITY DESCRIPTION AS SHOULD HAVE BEEN BILLED cured meats	43,076	$5.29 * CWT	—	[illegible]
TARIFF AND RATE AUTHORITY		AMOUNT OF [ ] OVER OR [✓] UNDER CHARGES			$50[illegible]

Barlow Truck Lines, Inc. MC-148899
ICC BARN 201-B

* Rate based on mileage but carrier did not charge in accordance with N & B mileage guide.

VERIFICATION BY BUREAU OF TRAFFIC

NAME AND TITLE: [signature] TR + TA

DATE: 2-14-90

NAME OF INVESTIGATOR AND DATE: 1/10/90
Michael W. Walker, Special Agent

OCP-F-19 (7/81)

INTERSTATE COMMERCE COMMISSION TABLE OF RATE REFERRALS	SUBJECT OF INVESTIGATION Richard M. Stephens, d/b/a Bar Enterprises ; Jon L. Girod; and Ness and Co.	EXHIBIT NUMBER 42 INVESTIGATION NUMBER C-88-89
CONSIGNOR John Morrell & Co.	CONSIGNEE West Coast Meat	
ORIGIN Sioux Falls, SD	DESTINATION Spokane, WA	
ROUTE	FREIGHT BILL NUMBER 3357	DATE 6/26/89

B/L NO. AND DATE	COMMODITY DESCRIPTION AS BILLED	WEIGHT	RATE	OTHER CHARGES	TOTAL CHARGES
	meat	1194 miles	$1.10 per mile	—	$1313.40
	COMMODITY DESCRIPTION AS SHOULD HAVE BEEN BILLED meat	40,000	$4.39 cwt (40M min)	—	$1756
			AMOUNT OF [ ] OVER OR [V] UNDER CHARGES		$442.60

TARIFF AND RATE AUTHORITY

Old Reliable Transportation, Inc. MC-187755
ICC ORLT 400
Item 725

VERIFICATION BY BUREAU OF TRAFFIC NAME AND TITLE		DATE	NAME OF INVESTIGATOR AND DATE
Marion Rogers	TR+TA	2-6-90	1/10/90 Michael W. Walker, Special Agent

MP-8-19 (7/81)

INTERSTATE COMMERCE COMMISSION

TABLE OF RATE REFERRALS

SUBJECT OF INVESTIGATION: Richard M. Stephens, d/b/a Bar Enterprises; Jon L. Girod; and Ness and Co.

EXHIBIT NUMBER: 44

INVESTIGATION NUMBER: C-88-89

CONSIGNOR: John Morrell & Co.

CONSIGNEE: White Poultry

ORIGIN: Sioux Falls, SD

DESTINATION: Portland, OR

ROUTE:

FREIGHT BILL NUMBER: 3414

DATE: 6/16/89

B/L NO. AND DATE	COMMODITY DESCRIPTION AS BILLED	WEIGHT	RATE	OTHER CHARGES	TOTAL CHARGES
	meat	1540 miles	$1.10 per mile	2 stops @ $45 = $90	$1694 + 90 = $1784
	COMMODITY DESCRIPTION AS SHOULD HAVE BEEN BILLED: meat	?	$5.41 * cwt (40M min)	2 stops @ $40 = $80	$2164 + 80 = $2244

TARIFF AND RATE AUTHORITY: Trumpet Transport Co. MC-164920 ICC TMPT 200

AMOUNT OF [ ] OVER OR [V] UNDER CHARGES: $460

* Rate based on miles rate would have applied had Carrier participated in the 13 mileage guide.

VERIFICATION BY BUREAU OF TRAFFIC

NAME AND TITLE: Marvin Reynolds TRATP

DATE: 2-9-90

NAME OF INVESTIGATOR AND DATE: 1/10/90 Michael W. Walker, Special Agent

ICC F 1 (7/81)

INTERSTATE COMMERCE COMMISSION TABLE OF RATE REFERRALS	SUBJECT OF INVESTIGATION: Richard M. Stephens, d/b/a Bar Enterprises; Jon L. Girod; and Ness and Co.	EXHIBIT NUMBER 50 INVESTIGATION NUMBER C-88-89
CONSIGNOR John Morrell & Co.	CONSIGNEE United Grocers	
ORIGIN Sioux Falls, SD	DESTINATION Portland, OR	
ROUTE	FREIGHT BILL NUMBER 33171	DATE 2/16/89

B/L NO. AND DATE	COMMODITY DESCRIPTION AS BILLED	WEIGHT	RATE	OTHER CHARGES	TOTAL CHARGES
	meat	1540 miles	$1.10 per mile	—	$1694
	COMMODITY DESCRIPTION AS SHOULD HAVE BEEN BILLED meat	35,761 lbs. 42000	$465	—	1953 00
TARIFF AND RATE AUTHORITY		AMOUNT OF [ ] OVER OR [✓] UNDER CHARGES			$259.00

Engels Truck Service, Inc. MC-150499
ICC ENTL 201
Item 206c

VERIFICATION BY BUREAU OF TRAFFIC			NAME OF INVESTIGATOR AND DATE
NAME AND TITLE		DATE	1/10/90 Michael W. Walker, Special Agent

OCP-7-10 (7/81)

INTERSTATE COMMERCE COMMISSION

TABLE OF RATE REFERRALS

SUBJECT OF INVESTIGATION: Richard M. Stephens, d/b/a Bar Enterprises; Jon L. Girod; and Ness and Co.

EXHIBIT NUMBER: 53

INVESTIGATION NUMBER: C-88-89

CONSIGNOR: John Morrell & Co.	CONSIGNEE #1: Assoc. Grocers	#2 Fred Meyer, Inc.
ORIGIN: Great Bend, KS	DESTINATION: Seattle, WA	Clackamas, OR
ROUTE:	FREIGHT BILL NUMBER: 5230	DATE: 7/7/89

B/L NO. AND DATE	COMMODITY DESCRIPTION AS BILLED	WEIGHT	RATE	OTHER CHARGES	TOTAL CHARGES
	cured meats	1712 miles	$1.15 per mile	1 stop $40	$1968.80 + 40 = $2008.80
	COMMODITY DESCRIPTION AS SHOULD HAVE BEEN BILLED: cured meats	43155	550	1 stop $50	2373.52 + 50.00 = $2423.52

TARIFF AND RATE AUTHORITY

Cal-Inland, Inc MC-155831
ICC CAII 200-A
Item 3100 S/O Item 906

AMOUNT OF [ ] OVER OR [✓] UNDER CHARGES: $414.72

NOTE: Item 4100 cannot be used. distance rates w CAL-INLAND does not participate in NGB Mileage guide.

VERIFICATION BY BUREAU OF TRAFFIC

NAME AND TITLE: [illegible] TRFFA

DATE: 2-6-90

NAME OF INVESTIGATOR AND DATE: 1/10/90 Michael W. Walker, Special Agent

OCP-F-19 (7/81)

UNITED STATES GOVERNMENT

EAS 1369
DATE: January 29, 1991

TO : Frank H. Wait Jr.
Special Agent – Jacksonville

FROM : James E. Manning
Chief, EAS Branch, BOT

SUBJECT : Verification of Rates – World Marine Transport, Inc.

This is in reference to your memorandum of January 15, 1991, requesting verification of rates shown on 20 OCP-F-19 tables.

Where possible, the rates on the 20 exhibits have been verified, or corrected. Exhibit 1 could not be rated since the shipment moved prior to World Marine Transport's rates becoming effective February 6, 1990.

It is also noted that the carrier does not participate in Household Goods Carriers' Bureau mileage guide, ICC HGB 100 series, but the carrier does maintain provisions in its tariff that provide that actual mileages via route of movement may be used under certain circumstances such as requirements by State authorities.

Exhibit 18 could not be rated since the carrier does not maintain rates on iron or steel pipe.

Basic research and analysis was performed by TR&TA Reynolds. I have reviewed the file and agree with his conclusions.

All papers are returned.

INTERSTATE COMMERCE COMMISSION TABLE OF RATE REFERRALS	SUBJECT OF INVESTIGATION WORLD MARINE TRANSPORT, INC. 9788 Normandy Boulevard Jacksonville, Florida 32221	EXHIBIT NUMBER # 7 INVESTIGATION NUMBER E-5486-90
CONSIGNOR W.M.T.	CONSIGNEE Lockwood Boat Works	
ORIGIN Fontana, CA	DESTINATION South Amboy, NJ	
ROUTE WMT - Direct	FREIGHT BILL NUMBER 203736	DATE 5/22/90

B/L NO. AND DATE	COMMODITY DESCRIPTION AS BILLED	WEIGHT	RATE	OTHER CHARGES	TOTAL CHARGES
5/22/90	One (1) Freedom 27' Sailboat WMT Freight Bill Attached		1.26 - 1st 100 miles 1.01 - 2659 miles Item 205 --- 50.00 Item 340 --- 138.41		$3000.00
	COMMODITY DESCRIPTION AS SHOULD HAVE BEEN BILLED				
5/22/90	Same as above		1.94 - 1st 100 miles 1.47 - 2659 miles Item 205 --- 205.14 Item 340 --- N/A		194.00 3908.73 206.14 —
					$4307.87
TARIFF AND RATE AUTHORITY		AMOUNT OF [ ] OVER OR [X] UNDER CHARGES			$ 1307.87

Household Goods Mileage Guide #14 effective 12/31/87.
WMT Tariff - WMTB 400 - Section 5, Single boat charge for 27' boat.
Plus corrected application of the referenced item nos. in the tariff.

VERIFICATION BY BUREAU OF TRAFFIC		NAME OF INVESTIGATOR AND DATE
NAME AND TITLE [illegible] TRTA	DATE 1-24-91	Special Agent Frank H. Wait, Jr.

UNITED STATES GOVERNMENT

Memorandum

EAS 1381
DATE: February 7, 1991

TO : David Armitage
Regional Compliance Officer
Chicago, IL

FROM : James E. Manning
Chief, EAS Branch, BOT

SUBJECT : Verification of Rates – Nebraska Transport Co., Inc.

This is in response to your memorandum of January 28, 1991, concerning twelve unnumbered OCP-F-19 tables submitted for rate verification.

Nebraska Transport Co.'s Tariff ICC NEBT 400 refers to Household Goods Carriers' Bureau Mileage guide to determine the distances. This carrier never issued a power of attorney or otherwise concurred in the Household Goods Carriers' Bureau Mileage Guide. Therefor [sic] all the mileage rates are void as a matter of law (49 C.F.R. 1312.4(d) [sic]. We have indicated on the tables the rates and charges that would have applied had the carrier participated in the mileage guide.

Where Nebraska Transport participated in bureau tariffs, we have shown the applicable class rate. In the case of the two shipments from Ohio points, to Illinois points, the carrier did not participate in Central States Motor Freight Bureau.

It may be possible that the carrier had a discount in effect that was applicable on the class rates, but do to the

volume and different types of discounts that the carrier maintained it is impossible to determine if any one discount was applicable.

All papers are returned.

INTERSTATE COMMERCE COMMISSION

Memorandum

DATE: 1-28-91

TO : James E. Manning
Chief, Enforcement Branch

FROM : David Armitage
Regional Compliance Officer /s/ D. Armitage
Chicago, IL

SUBJECT : Assignment C-23-91
Nebraska Transport Co., Inc.
MC 121066

Attached is Special Agent Daugherty's memorandum January 23, 1991, including twelve (12) Tables of Referrals.

In the past, these Tables have been sent through Mr. Frank Bail, OCCA. However, while Mr. Bail is on detail to the Inspector General's office, Associate Director Love has approved my sending them directly to you.

Thank you in advance for your assistance in this matter.

Atts.

cc: SA Daugherty

wants both the applicable class rate & the mileage rate if carrier had participated in the mileage guide.

INTERSTATE COMMERCE COMMISSION

TABLE OF RATE REFERRALS

NEBRASKA TRANSPORT CO., INC.
SCOTTSBLUFF, NE

INVESTIGATION NUMBER C-23-91

CONSIGNOR: Metal Goods	CONSIGNEE: Metal Goods
ORIGIN: Ambridge, PA 15003	DESTINATION: Kansas City, MO 64116
ROUTE: Nebraska Transport Co., Inc.	FREIGHT BILL NUMBER: 8-05239 / DATE: 12/4/90

B/L NO. AND DATE	COMMODITY DESCRIPTION AS BILLED	WEIGHT	RATE	OTHER CHARGES	TOTAL CHARGES
	Plate Steel	45671	Flat 941.00		941.00
	COMMODITY DESCRIPTION AS SHOULD HAVE BEEN BILLED				
*	Plate Steel 837 MI	45671	113 per MI Fuel Surcharge 6%		962.55 57.75 1020.30
*	RB 10853		6.54 cwt Fuel Surcharge 6%		2986.88 179.21 3166.09
			AMOUNT OF [ ] OVER OR [X] UNDER CHARGES		80.52

TARIFF AND RATE AUTHORITY

*ICC NEBT 400 Rate Table 1-E + Supplement 2

*ICC MWB 550-D TABLE 1 + ICC MWB 198 Fuel Surcharge

VERIFICATION BY BUREAU OF TRAFFIC

NAME AND TITLE: Marvin Reynolds TR+TA

DATE: 2-6-91

NAME OF INVESTIGATOR AND DATE: Gail Daugherty January 15, 1991

OCP-7-19 (7/81)

No. 93-284

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

SECURITY SERVICES, INC. v. K MART CORPORATION

On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF FOR AMICUS CURIÆ THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE IN SUPPORT OF RESPONDENT

Frederic L. Wood*
Nicholas J. DiMichael
Richard D. Fortin
1275 K Street, NW
Washington, DC 20005
Tel. (202) 371-9500

Counsel for The National Industrial Transportation League, *Amicus Curiæ*

*Counsel of Record

January, 1993

QUESTION PRESENTED

In an action by a motor common carrier subject to the provisions of the Interstate Commerce Act to recover additional tariff charges, does the Interstate Commerce Commission have authority to promulgate and apply a regulation declaring a carrier's mileage rate tariff unlawful and void when the carrier fails to provide a clear and explicit statement of its rates because it does not participate properly in a mileage guide tariff issued by an agent?

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No. 93-284

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

SECURITY SERVICES, INC.
v.
K MART CORPORATION

On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF FOR AMICUS CURIÆ THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE IN SUPPORT OF RESPONDENT

The National Industrial Transportation League, pursuant to Rule 37.3 of the Rules of this Court, submit this brief as *amicus curiæ* in support of respondents. All parties have consented to the filing of this brief, and the original letters from counsel of record for the parties granting such consent have been filed with the Clerk of this Court.

INTEREST OF AMICUS CURIÆ

The membership of The National Industrial Transportation League ("League") is comprised of over 1200 shippers and groups and associations of shippers conducting industrial and/or commercial enterprises, large, medium and small, in all states of the Union. The members of the League are

substantial users of transportation by motor common carrier.

The League participates actively before administrative, judicial and legislative bodies to protect the interests of its shipper members. The League supports the result of the decision of the Interstate Commerce Commission ("ICC") in its Docket No. 40510, *Jasper Wyman & Son, et al. — Petition for Declaratory Order — Certain Rates and Practices of Overland Express, Inc.*, 8 I.C.C. 2d 246 (1992) [*"Jasper Wyman"*], *rev'd, Overland Express, Inc. v. ICC*, 996 F.2d 356 (D.C. Cir. 1993) [*"Overland"*].

In the *Jasper Wyman* decision, the ICC determined that one of its long-standing regulations, 49 C.F.R. §1312.4(d), made a mileage rate tariff void and unlawful when a carrier failed to maintain in effect either a power of attorney or a concurrence in a mileage guide tariff separately published by an agent that was incorporated by reference in the mileage rate tariff. 8 I.C.C.2d at 253-54. It also determined (as a separate grounds for its decision) that the mileage rate tariff did not contain an applicable rate when the agent that published the mileage guide tariff published a tariff showing on its face that the motor carrier was no longer a party. 8 I.C.C.2d at 255.[1] The Commission then concluded that, in either situation, there was no published and effective tariff that could provide a complete basis for establishing the rates the motor carrier was seeking from the shipper, and its claim for additional freight charges was invalid. 8 I.C.C. 2d at 247-8.

[1] The mileage guide involved in *Jasper Wyman* and this case was compiled and filed at the ICC by a tariff publishing agent, the Household Goods Carriers Bureau ("HGB"). Because of its national coverage and accuracy, this mileage guide is widely utilized by motor carriers of all types of commodities as the basis for distances used to calculate applicable rates based on mileages.

The Third Circuit's decision under review involves the application of the principles of the ICC's decision in *Jasper Wyman* to the facts of a particular case involving transportation provided by a motor common carrier, Security Services, Inc. (formerly known as Riss International, Inc.) ["Riss"] to K Mart Corporation, the respondent. The National Industrial Transportation League, as *amicus curiæ*, supports the respondent in this case.

SUMMARY OF ARGUMENT

Before the a shipper is subjected to the harsh effects of the filed rate doctrine, a motor carrier subject to the Interstate Commerce Act must first publish and file a tariff which contains a clear and explicit statment of the rate to be applied. the Interstate Commerce Commission has implied authority under the Act to adopt and apply a regulation that declares void as a matter of law a tariff that lacks such a clear and explict statement of the rate.

ARGUMENT

This case is the latest episode in the seemingly endless efforts by representatives of bankrupt and other non-operating motor carriers to collect additional freight charges on shipments occurring years before. Two recent cases have come before this Court as a result of those efforts: *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990)["Maislin"] and *Reiter v. Cooper*, 507 U.S. ___, 113 S. Ct. 1213 (1993).

Those efforts have also now led to the passage of the Negotiated Rates Act of 1993, Pub. L. 103-180, 107 Stat. 2044 (Dec. 3, 1993). As explained in the legislative history, the purpose of this Act:

> is to provide a statutory process for resolving disputes for claims involving negotiated transportation rates brought about by trustees for non-operating motor carriers for past transportation services. The bill provides a procedure for settlement of such claims, as well as a statutory mechanism for certain other transportation regulatory changes

H. Rep't No. 359, 103rd Cong. 1st Sess., 7-8 (1993).

The new Act does not directly address the issue before the Court in this case. However, it does provide a clearer basis for resolution before the ICC of two defenses to the Riss' undercharge claim in addition to the one now before this Court,

neither of which were addressed by the courts below. *See* 996 F.2d at 1519, n.1. First of all, the new act provides that K Mart's claim that the transportation service provided by Riss was contract carriage, and not common carriage, must be resolved only by the ICC. *See* 49 U.S.C. §11101(d), as added by §8 of Pub. L. 103-180. It also modifies the standard for the ICC's determination of K Mart's claim (as allowed by *Reiter v. Cooper*) that the rate levels sought by Riss exceed a reasonable maximum level. *See* 49 U.S.C. §10701(e), as amended by §2(g) of Pub. L. 103-180.

In addition to the defenses temporarily put aside by the courts below, the new Act also provides two other remedies that might be available to K Mart and other similarly situated shippers who are being subjected to undercharge claims by representative of non-operating motor carriers. First of all, the Act allows a qualifying shipper to compel the representative to accept a compulsory satisfaction of the undercharge claim on the basis of certain percentages stated in the statute. 49 U.S.C. §10701(f), as added by §2(a) of Pub. L. 103-180. Finally, for shipments occurring before September 30, 1990, the new Act restores the unreasonable practice defense that was set aside by this Court in *Maislin*. §2(e) of Pub. L. 103-180.

Although the Negotiated Rates Act provides a variety of remedial provisions for shippers facing undercharge claims, the complete defense of failure to file and maintain a lawfully effective tariff was not addressed by the Congress, probably because of

the late appearance of the division between the several courts of appeals that have addressed this issue. *Compare* the decision of the court of appeals below, *Atlantis Express, Inc. v. Associated Wholesale Grocers, Inc.* 989 F.2d 281 (8th Cir. 1993) and *Freightcor Services, Inc. v. Vitro Packaging, Inc.*, 969 F.2d 1563 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 979, *with Brizendine v. Cotter & Co.*, 4 F.3d 457 (7th Cir. 1993), *Security Services, Inc. v. P-Y Transportation, Inc.* 3 F.3d 966 (6th Cir. 1993) and *Overland.*

Although the new Act will provide K Mart and other similarly situated shippers with several avenues of relief, even if this Court reverses the court of appeals, this Court should affirm the court of appeals because the application of the principles correctly established by the ICC's *Jasper Wyman* decision will provide a prompt and certain resolution of a considerable number of similar undercharge claims.

A. Application of the Filed Rate Doctrine Requires a Clear and Explicit Statement of the Rate in a Tariff

The fundamental flaw in the argument of the petitioners and supporting amicus (and in the decision of the D.C. Circuit in *Overland* upon which they rely) is a failure to recognize that the tariffs involved are incomplete and do not adequately disclose the applicable rate. If the filed rate doctrine is to be applied strictly, then motor common carriers have an equally strict obligation

under the Interstate Commerce Act to prepare and file correctly the tariffs that form the basis of the rate sought to be collected in the undercharge case. Before the filed rate doctrine can be applied, there has to be, as a matter of both fact and law, a filed rate that is clear and explicit. In this case, and all the others subject to the principles of the *Jasper Wyman* decision, well-established rules of law require a decision that there was no filed rate.

Ever since motor common carriers were first required to publish, file and observe tariffs, the ICC has required those tariffs to contain a clear and explicit statement of the applicable rates, including the means of determining distances for mileage-based rates. Exercising the authority provided by both 49 U.S.C. §10762(a)(1) ("The Commission may prescribe other information that motor common carriers shall include in their tariffs."), and 49 U.S.C. §10762(b)(1) ("The Commission shall prescribe the form and manner of publishing, filing and keeping tariffs open for public inspection ...."), the ICC's regulations in effect at the time the shipments at issue were transported required rates in tariffs to be clear and explicit:

> Rates, fares, and provisions shall be clearly stated and arranged in a systematic manner which establishes the rate ... for each service offered or performed by the serving carrier. ... [O]ther tariff elements required to determine the applicable rate ... shall be clearly explained.

49 C.F.R. §1312.14(a).[2]

As applicable to motor common carriers, 49 U.S.C. §10762(a)(1) is derived from Section 217(a) of the Act, as added by the Motor Carrier Act of 1935, §1, 49 Stat. 560 (Aug. 9, 1935). The ICC immediately after the 1935 Act interpreted this provision as requiring a clear means on the face of the tariff for determining distances in deriving the applicable rates from rate tables based on distances. *Mid-Western Motor Freight Tariff Bureau v. Eichholz*, 4 M.C.C. 755, 757 (1938)(prohibiting the use of speedometer readings to determine applicable rates based on distances). At the same time, the ICC recognized that, before a tariff could be applied under section 217(b) of the Act (now 49 U.S.C. §10761(a)), they must be strictly construed, and any reasonable doubts as to their meaning must be construed in favor of the shipper and against the carrier. *See, e.g., W. A. Barrows Porcelain Enamel Co. v. Cushman Motor Delivery Co.* 11 M.C.C. 365, 369 (1939).[3]

It would be a manifest injustice to require a shipper to comply with the statutory requirements for strict observance of a tariff, 49 U.S.C. §10761(a), when he cannot determine with cer-

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2 The ICC's latest revised tariff regulations, which are not yet applicable to motor common carriers, contain a nearly identical requirement. 49 C.F.R. §1314.3.

3 *See also C & H Transportation Co. v. US*, 436 F.2d 480, 482 (Ct. Cl. 1971).

tainty the rate. The ICC's regulations requiring a tariff to contain a clear and explicit statement of the rate is a recognition of this fundamental principle. This requirement for certainty and clarity in the application of the filed rate is an essential element of the regulatory scheme. *Regular Common Carrier Conference v. United States*, 793 F.2d 376, 379-80 (D.C. Cir. 1986).

This Court has held that a "tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon [carrier] and shipper alike." *Pennsylvania R. Co. v. International Coal Mining Co.*, 230 U.S. 184, 197 (1913) If, as this Court has stated in *Maislin*, 497 U.S. at 127-28 and n.9, a shipper is thus to be "conclusively presumed" to have constructive knowledge of the contents of a filed tariff (even though he may never have actual knowledge of those contents), then that tariff ought to be complete and accurate. When the tariffs published and filed by a motor carrier on their face do not permit a clear and explicit determination of the rate, because the carrier is not shown as a participating carrier in the separate mileage guide tariff purportedly incorporated by reference into the underlying distance rate tariff, then a shipper does not have a legal basis for determining the applicable rate.

By way of analogy, this Court has long held that criminal statutes are void for vagueness "where one could not reasonably understand that his contemplated conduct is proscribed." *United States v. National Dairy Products Corp.* 372 U.S.

29, 32-33 (1963). In view of both the criminal penalties that can attach to both shipper and carrier for failure to observe filed tariffs (*see Maislin*, 497 U.S. at 120, and note 2), and the "harsh effects of the filed rate doctrine" (*Id.* 497 U.S. at 128), it would be entirely logical to apply a similar standard for required clarity in the application of those tariffs. In this case, the absence of Riss from the list of carriers participating in the HGB Mileage Guide would make it reasonably clear to any person that Riss did not have a rate that could be applied. A shipper who could reasonably make such a determination cannot and should not be subjected to liability for additional freight charges.

A hypothetical situation makes the point even clearer. If a shipper, such as K Mart, had actually examined various tariffs filed at the ICC or provided by Riss, in advance of making some shipments of property, to determine which motor carriers had a rate on file that would be available for its use, it would have immediately determined that Riss was not a carrier it could use. On their face, the tariffs do not provide a clear and explicit mileage rate that K Mart could determine, because Riss would clearly be absent from the published and filed list of carriers participating in the HGB Mileage Guide, notwithstanding its effort to incorporate the provisions of the Guide by reference. This plainly creates uncertainty as to the applicability of the rate. Under these circumstances, K Mart would select another carrier, and the tariff publication would have served its purpose of establishing a clear and

explicit rate for use by the shipper. No shipper should be charged with constructive knowledge and application of a tariff rate which it would not use if it actually examined the tariff involved.

Recognition of the need to make the application of the filed rate doctrine dependent on the existence of a clear and explicit filed rate also is consistent with this Court's decisions in *Davis v. Portland Seed Co.*, 264 U.S. 403 (1924) and *Berwind-White Coal Mining Co. v. Chicago & E. R. Co.*, 235 U.S. 371 (1914). For example, in the latter case, the Court explicitly noted that the tariffs involved satisfied the Act's requirements because "it is certain as a matter of fact they were adequate to give notice." 235 U.S. at 375. In the *Davis* case, the issue was more complicated, because the central question was whether a shipper could obtain without proof of actual injury the application of a lower rate from a more distant point in order to prevent a violation of what is now 49 U.S.C. §10726. This Court held that it could not permit application of a rate other than the published higher rate from the intermediate point "without proof of pecuniary loss." 264 U.S. at 425. In any case, the tariff publications establishing both the higher and lower rates were clear. 264 U.S. at 415.

In short, these two cases both recognized the need for tariffs to contain clear and explicit statements of the rates that provide "adequate notice" to shippers of the applicable rate. Because the tariffs relied on by Riss as the basis for seeking additional charges from K Mart are not clear and

explicit, they may not form the basis of any recoveryof undercharges by Riss.

B. THE UNCERTAINTY OF RISS' MILEAGE RATES MAKES THEM VOID AS A MATTER OF LAW

When there is a recognition that the Interstate Commerce Act, as interpreted and applied by the ICC in order to carry out its purpose, requires a clear and explicit statement of the rate in order to permit application of the filed rate doctrine, it immediately follows that the Commission may adopt regulations to enforce that requirement. In this case, the Commission's regulations contain a provision that a tariff that is incomplete because of a lack of proper participation is "void as a matter of law." 49 C.F.R. §1312.4(d). When such a regulation is applied so as to refuse to apply defective tariffs to past shipments, it satisfies the requirements of this Court's decision in *ICC v. American Trucking Associations, Inc.*, 467 U.S. 354 (1984).

In this case, Riss seeks to collect mileage based rates stated in a rate tariff that referenced the HGB Mileage Guide as the governing publication from which mileage between origin and destination points were to be calculated. This was a proper manner for Riss to publish mileage-based rates only if Riss also executed a power of attorney or concurrence authorizing the Bureau to act as Riss' tariff publication agent during the period relevant to the complaint. Riss did not do so.

The Commission's tariff regulations recognize that distance or mileage rates may be filed, but provide that the determination of distances must be based on one of three methods:

> 1) By publishing the distances between all locations covered by the distance rates in the tariff;
>
> 2) By referring to a map(s) attached to the tariff; or
>
> 3) By referring to a distance guide.

49 C.F.R. §1312.30(a), (c).

Under the Commission's regulations, "only distance guides officially on file with the Commission may be referred to." 49 C.F.R. §1312.30(c)(4). Critical to this case are two the regulatory requirements imposed on Riss at the time it filed its tariffs. First, that "carriers participating in tariffs that refer to, and are governed by, separate tariffs shall also participate in those governing separate tariffs." 49 C.F.R. §1312.27(e). Second, that issuance of a concurrence or a power of attorney is a necessary condition for participation in another party's tariff. 49 C.F.R. §1312.4(d).

Riss chose the third method specified in 49 C.F.R. §1312.30(c), by referring in its tariff to the HGB Mileage Guide. This choice did not, by itself, violate 49 C.F.R. §1312.30 because it provided the Household Goods Carriers Bureau with authority to file a mileage guide, and because the HGB Mileage Guide in fact was properly on file with the

Commission as required by 49 C.F.R. §1312.30(c)(4). But because the Riss rate tariff referred to another tariff filed by an agent, namely the HGB Mileage Guide, Riss was required to participate in the HGB Mileage Guide through the issuance of a formal concurrence or power of attorney to the Bureau. *See* 49 C.F.R. §§1312.4(d), 1312.27(e) and 1312.10. Riss failed to comply with this regulatory requirement, and by operation of the last sentence of 49 C.F.R. §1312.4(d), the Riss tariff therefore is void as a matter of law. Without a lawful means to determine the mileage to which the rate in the carrier's tariff should be applied, Riss has no basis for an undercharge claim. This is the same analysis applied by the ICC in *Jasper Wyman* (*see* 8 I.C.C.2d at 252-256), and it is equally applicable here.

Relying on such cases as *Davis v. Portland Seed Co.*, 264 U.S. 403 (1924), *Berwind-White Coal Mining Co. v. Chicago & E. R. Co.*, 235 U.S. 371 (1914) and *Genstar Chemical Ltd. v. ICC*, 665 F.2d 1304 (D.C. Cir. 1981), *cert. denied, Nitrochem, Inc. v. ICC*, 456 U.S. 905 (1982), petitioners (and the D.C. Circuit in *Overland*) have taken the position that the tariffs contain only "mere irregularities." But this contention overlooks the fact that 49 C.F.R. 1312.4(d) involves more than "mere irregularities." As applied in this case, it is part of the implementation of the "utterly central" directive from Congress to the ICC to ensure that filed rates are clear and explicit. None of the regulatory provisions

involved in those cases reflected the need to ensure a clear and explicit statement of the rates by declaring a tariff void as a matter of law for non-compliance, which is the case with 49 C.F.R. §1312.4(d).

It may be true that 49 C.F.R. §1312.4(d) is a regulation that retroactively voids an effective tariff. But as the Fifth Circuit held, the ICC's interpretation and application of 49 C.F.R. §1312.4(d) conforms with the standards stated in *ICC v. American Trucking Associations, Inc.*, 467 U.S. 354 (1984)["*ATA*"]. *Freightcor Services, Inc. v. Vitro Packaging, Inc.*, 969 F.2d at 1570-72. In the *ATA* case, this Court held that the Interstate Commerce Commission has implied authority under 49 U.S.C. §10321(a) to void and declare unlawful effective tariffs "when necessary to achieve specific statutory goals." 467 U.S. at 365. The Fifth Circuit and the ICC in *Jasper Wyman*, both ruled that 49 C.F.R. §1312.4(d) is within the Commission's authority because the regulation is directly and closely tied to the statute as a necessary means of enforcing the Commission's specific statutory mandate to determine the basic information that must be provided in every tariff and to ensure that the rates contained in the tariff are clear and explicit. 969 F.2d at 1570-72, and 8 I.C.C.2d at 256-260.

The principles of *Jasper Wyman* apply not just to the use of mileage guides, but to any situation where a carrier might create uncertainty and indefiniteness with respect to the applicable rate, by referring to another tariff in which it does

not participate. For example, soon after issuing *Jasper Wyman*, the Commission held, with judicial approval, that a carrier may not recover undercharges pursuant to a filed tariff that incorporates by reference, but without formal carrier participation, a separate classification tariff. *Wonderoast, Inc.--Petition for Declaratory Order--Certain Rates and Practices of Transportation Systems International, Inc.*, 8 I.C.C. 2d 272 (1992), *aff'd. sub nom., Lovett v. Wonderoast,* 1992 Bkrtcy LEXIS 1414, Adv. No. 4-89-292 (D.Minn. June 26, 1992).

In summary, 49 C.F.R. 1312.4(d) was properly and lawfully applied by the ICC to void, *ab initio* and as a matter of law, a tariff of a carrier that refers to an agent's or second carrier's tariff in which the publishing carrier is not a formal participant. As a matter of law, the application of tariff can be voided in order to enforce the requirement that Riss' mileage rate tariff contain clear and explicit rates. Without such a tariff, no basis exists for calculating the mileage so that the rates in Riss' tariff could be applied as a filed rate to the shipments of K Mart.

CONCLUSION

The decision of the United States Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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